Supreme Court, U.S.
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IN THE
Supreme Court of the United States

FRANK SMITH AND CONNIE TYREE, *Petitioners,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals flout the "ordinary equal protection standards" applicable to claims of selective prosecution identified in *United States v. Armstrong*, 517 U.S. 456, 465 (1996), when it:

   a. imposed a requirement that petitioners prove discriminatory purpose and discriminatory effect by "clear and convincing evidence" rather than by the preponderance of the evidence standard applied by other Circuits?

   b. adopted a definition of "similarly situated individuals" that eviscerates the Constitutional protection recognized in *Armstrong* by "mak[ing] a selective-prosecution claim impossible to prove," 517 U.S. at 466?

2. Were petitioners' convictions improperly sustained by the Court of Appeals when it held, in conflict with the interpretation of 42 U.S.C. §§ 1973i(c) and 1973i(e) applied by other Circuits, that these criminal provisions of the Voting Rights Act do not require the government to prove lack of voter consent in cases involving absentee ballots?

3. Did the Court of Appeals depart so fundamentally from the accepted course of judicial proceedings as to warrant correction by this Court when it blatantly ignored the plain language of the Sentencing Guidelines provision applicable to voting-related offenses?

4. Did the Court of Appeals sanction the violation of petitioner Tyree's Fifth and Sixth Amendment rights in approving the government's trial strategy of "effectively dr[iving a] defense witness off the stand," *Webb v. Texas*, 409 U.S. 95, 98 (1972), by threats of perjury prosecution both at the pre-trial hearing on petitioners' selective prosecution claim and at trial?

5. Did the Court of Appeals err in approving the trial court's admission of inherently prejudicial evidence regarding petitioner Tyree's witnessing of other absentee ballots about which the government conceded that it had no evidence of wrongdoing, as probative on the conspiracy count?

LIST OF ALL PARTIES TO THE PROCEEDING BELOW

The names of all parties to the proceeding below are included in the caption to this Petition.

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Note on Citations to the Record

The opinions and orders below are reprinted *infra* in the Appendix to this Petition and are cited as "App. __." The trial transcript is cited as "Tr. __." The transcript of the pre-trial hearing on the motion to dismiss the indictment on the ground of selective prosecution is cited as "SP Tr. __." The transcript of petitioners' sentencing is cited as "Sent. Tr. __."

PETITION FOR A WRIT OF CERTIORARI

Petitioners Frank Smith and Connie Tyree respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, which is reported at 231 F.3d 800, appears *infra*, in the Appendix to the Petition (App.) at pages 1 to 38. The Order of the District Court affirming and adopting the Magistrate's Report and Recommendation on the question of selective prosecution is not reported; it appears *infra* at App. 39. The Report and Recommendation of the Magistrate Judge was not reported. It appears *infra* at App. 40 to 60.

JURISDICTION

The judgment of the Court of Appeals was entered on October 25, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the due process clause of the Fifth Amendment, the compulsory process clause of the Sixth Amendment, and the equal protection clause of the Fourteenth Amendment. In addition, it involves 42 U.S.C. §§ 1973i(c) and 1973i(e). Finally, it involves Section 2H2.1 of the United States Sentencing Guidelines. Those provisions are reproduced *infra* at App. 61 to 63.

STATEMENT OF THE CASE

On January 30, 1997, petitioners Frank Smith and Connie Tyree were charged in a thirteen-count indictment with offenses alleged to have arisen out of the November 8, 1994, federal and general election in Greene County, Alabama.

Greene County, with a population over 90% black (App. 40-41), has been the site of fiercely waged, racially polarized political contests since the passage of the Voting Rights Act of 1965, which began the process of enfranchising its black citizens (App. 41). The pre-existing white political power structure resisted the black majority's pursuit of political power in a variety of ways that have previously required judicial intervention, including intervention by this Court. *See Hadnott v. Amos*, 394 U.S. 358, 362-63 (1969) (finding that the local probate judge had kept qualified black candidates off the general election ballot through discriminatory application of unprecleared state election laws). *See also United States v. Gordon*, 817 F.2d 1538, 1540 (11th Cir. 1987) (finding a colorable claim of selective *federal* prosecution of "members of the black majority faction"), *cert. dismissed*, 487 U.S. 1265 (1988). Today, the rival blocs might be described as, on one side, a black majority faction affiliated with the Alabama New South Coalition, and, on the other, a formally nonpartisan and biracial group, the Citizens for a Better Greene County ("CBGC"), founded by political opponents of the black majority faction. See App. 42-44.

Absentee voting plays a critical role in Greene County's electoral politics. As the Magistrate Judge who conducted the selective prosecution hearing in this case found, "[b]ecause of the history of violence and intimidation associated with efforts by African-Americans to exercise their vote, many African-Americans continued to be uncomfortable going to the polls to vote, and felt more comfortable voting an absentee ballot in the privacy of their homes." The result is a significantly

higher rate of absentee voting in Greene County compared to counties with predominantly white populations. App. 41. In 1994, 1,429 of the roughly 3,800 votes cast in Greene County were cast absentee. Fewer than 40 of these were cast by white voters. App. 42.[1]

A. The Decision To Prosecute the Petitioners

The 1994 election for the Greene County Commission was hotly contested. It pitted candidates supported by the black majority against candidates whose support came from the Citizens for a Better Greene County. See App. 44. The investigation that led to this prosecution began even before the election, when politicians in the anti-New South faction contacted the FBI and the U.S. Attorney's Office to complain about possible voting irregularities. Members of the black majority faction also complained, after the election, about violations committed by their opponents. App. 44-45. Until October 1995, however, the investigation was essentially dormant, in part because the United States District Court for the Southern District of Alabama had impounded all absentee ballots throughout the state in connection with an unrelated election dispute. App. 45.

In the fall of 1995, the Alabama Attorney General's Office asked to join the investigation. App. 45. Gregory Biggs, the same state Assistant Attorney General who was leading state court voting prosecutions involving predominantly black Hale and Wilcox Counties, was designated a "Special Assistant United States Attorney" and participated in the investigation and trial of petitioners. App. 40, 46, 51. At the time of the events below, the district attorney and Alabama circuit judges with jurisdiction over

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[1]The Magistrate Judge observed that the small number of whites who cast absentee ballots paralleled the small proportion of the county's population that was white. App. 42 n.1.

Hale and Wilcox Counties were white; the district attorney and circuit judge with jurisdiction over Greene County were both African-American. App. 41.

Because absentee ballots must be witnessed by two individuals under Alabama law *(see* Ala. Code § 17-10-7), investigators decided to focus on individuals who witnessed multiple absentee ballots, narrowing their scrutiny to the approximately 800 absentee ballots that had been witnessed by one or more persons who had performed the same function on more than fifteen ballots. App. 46-47. Among those who had witnessed a substantial number of ballots were petitioner Tyree, who had witnessed 166, and several members of the opposing political camp, including Rosie Carpenter, who witnessed approximately 100, Lenora Burks, and Annie Thomas. App. 46; SP Tr. 990-91.

Ultimately, petitioners were alleged to have acted illegally with respect to seven of the 1,429 absentee ballots cast in the 1994 general election. Count 1 of the indictment charged both petitioners with a conspiracy in violation of 18 U.S.C. § 371; Count 2 charged both petitioners with voting more than once in violation of 42 U.S.C. § 1973i(e); and Counts 3-13 charged one or both of the petitioners with providing false information for the purpose of establishing eligibility to vote in violation of 42 U.S.C. § 1973i(c) with respect to the absentee ballots cast by each of seven Greene County voters.

B. The Selective Prosecution Claim

Petitioners moved to dismiss the indictment on grounds of selective prosecution. The Magistrate Judge found that petitioners had made a threshold showing of racial or political selectivity and as a result, allowed discovery and conducted a five-day evidentiary hearing. See App. 10-11 n.4.

At the hearing, substantial lay and expert testimony was presented. The Magistrate Judge found that "[t]he testimony of

the [petitioners]' handwriting expert . . . established that a number of other people, aside from the [petitioners], may have been involved in obtaining forged or fraudulent voter signatures on absentee ballots." App. 48-49. The Magistrate Judge summarized in his opinion the expert's conclusions that it was "virtually certain," "highly probable," or otherwise likely that signatures on seventeen voters' absentee ballots had been written by neither petitioners nor the voters but by identifiable individuals whom he named. App. 49-50.

Buttressing this expert opinion regarding the existence of individuals similarly situated to petitioners was extensive lay testimony by witnesses who reported that they had contacted the FBI or the Alabama authorities with complaints about violations committed by activists in the anti-New South Coalition bloc but that the investigators had not followed up on these indications of voting irregularities, or that to the extent the FBI *did* investigate allegations made by New South Coalition members, it did so *after* the filing of the selective prosecution motion in this case, suggesting that the investigation was conducted for the purpose of rebutting the motion. See SP Tr. 419-31. The government responded to these complaints during the selective prosecution hearing by insisting that its investigation of the 1994 elections in Greene County was "ongoing." *E.g.*, SP Tr. 975-76.

Ultimately, Magistrate Judge Putnam issued a report and recommendation suggesting that petitioners' motion be denied. The linchpin of his analysis with regard to the "selectivity" prong was his belief that the mere presence of similarly situated but unprosecuted individuals is insufficient:

> It is not enough to show simply that the defendant has been prosecuted and that some other person like him has not yet been prosecuted. . . . [S]ome are prosecuted presently, and others will be prosecuted in the future.

App. 54-55. Thus, although it was

> certainly true that there is evidence in the record indicating that other people have engaged in fraudulent absentee-ballot voting activities, including forging voters' signatures and altering ballots[, w]hat has not been shown is that these other individuals will *never* be prosecuted.

App. 57 (emphasis added).[2]

As for the question of the government's motivation, the Magistrate Judge held that race could not be "a motivating factor" in the decision to prosecute petitioners because "[a]ll of the other [similarly situated] people identified by the defendants are themselves African-American, like the defendants." App. 58. As for the question of an impermissible political motivation, the Magistrate Judge held that the fact that some similarly situated individuals were members of neither petitioners' faction nor the opposing faction rebutted their allegation that they had been singled out. App. 59.

The district court adopted the Magistrate Judge's report and recommendation in its entirety. App. 39.

B. The Trial

Judge C. Lynwood Smith, Jr. presided over petitioners' trial, which lasted from September 8 to September 15, 1997. During jury selection the judge sustained petitioners' *Batson* objection to the government's peremptory strike of one black veniremember and seated the juror; the court also held that the government had only "tenuous" reasons for two other strikes, although it declined to find them *Batson* violations.

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[2]The five-year statute of limitations for offenses arising out of the 1994 election, 18 U.S.C. § 3282, has now run, and it is undisputed that the government has never prosecuted a single white individual nor any individual who is not associated with the New South Coalition for any irregularities arising out of the 1994 Greene County elections.

It was undisputed that one or both of the petitioners were involved with each of the seven absentee ballots that were the subject of the indictment, either as a witness or in filling out "administrative" information such as the voter's name, address, or polling place on the ballot or prior ballot application request.[3] As to some, but not all, of the applications or affidavits, there was testimony that petitioners also provided the voter's signature.

The government called as witnesses six of the voters whose ballots were at issue. The government did not call the seventh voter, Shelton Braggs, whose vote was the subject of Counts 12 and 13 of the indictment.

Each of the six voters who testified provided *some* evidence from which the jury might have concluded that he or she did not ask petitioners to request or to cast an absentee ballot for the voter in the 1994 general election. But the government was forced to rely on several voters' grand jury testimony because, on the stand in open court, the voters indicated that they had consented to the casting of their votes. For example, voter Michael Hunter testified at trial that he had authorized his brother's signing his name on the ballot that he had voted; the government introduced Hunter's testimony before the grand jury to prove lack of consent. Tr. 463-68, 479-82. Voter Willie C. Carter testified at trial that he had given petitioner Smith permission to submit an absentee application; the government introduced his testimony before the grand jury to prove lack of consent. Tr. 565-67, 573-76.

The government presented no evidence with regard to Shelton Braggs's consent. The government had no known examples

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[3]It is perfectly legal for someone other than the voter to fill out this "administrative" information; the Circuit Clerk testified that on occasion, the staff in her office would insert the necessary information. Tr. 225-26.

of Braggs's handwriting, and its expert witness testified that Tyree had *not* signed Braggs's absentee ballot application. Tr. 756. The only evidence in the record regarding Braggs was that he was a registered voter in Greene County who spent most of his time out of state and that, during the summer of 1994, he had been Tyree's boyfriend and had been living with her. Tr. 877-80.

On the counts relating to voter Sam Powell, Tyree was prevented from presenting critical evidence by the district court's exclusion of a key witness's testimony: Burnette Hutton, Powell's daughter, had appeared, voluntarily, as a defense witness at the selective prosecution hearing. She testified that *she* had assisted her father, who was illiterate and whose business affairs she handled, with his absentee ballot in 1994 by signing for him. She also testified that she had told FBI agents who had interviewed her that *she* had signed her father's ballot with his consent. See SP Tr. 296-303.

At the end of its cross-examination, the government abruptly demanded that Hutton provide handwriting exemplars in open court. SP Tr. 327. The clear import of this demand was to threaten Hutton with prosecution for perjury for sticking to her story. Certainly, the magistrate judge understood that to be the message, since he interrupted the hearing to appoint counsel for her. SP Tr. 333.

In light of the government's threat to open a perjury investigation and her newly appointed attorney's sense that she had not intelligently waived her Fifth Amendment rights, the magistrate judge announced that "I'm not going to make her get on the stand now." The U.S. Attorney responded:

> Judge, we certainly understand that. And *basically the last thing, I think, that we had was the handwriting*, wasn't it[,] Pat [Assistant U.S. Attorney Meadows]?
>
> MR. MEADOWS: *The handwriting. And I wanted to mark those affidavits so that they could be identified* that those

> are the affidavits that we were talking about, and the application. I haven't had a chance to do that yet.

SP Tr. 345-46 (emphasis added). The magistrate judge refused to require Hutton to testify as to the ballot affidavit:

> I'm not going to make her do that. It seems to me that that goes more to helping establish the perjury charge, because ultimately what that would be is that would be the basis for saying, this is the affidavit you claim to have signed for your father. Here the handwriting on this affidavit does not match your actual handwriting exemplars, therefore it must be a perjury.

SP Tr. 349. He did, however, order Hutton to provide handwriting exemplars. Later, *the government's own expert witness* concluded not that Tyree signed Powell's ballot, but that "the Sam Powell voter signature on the affidavit, compared to the known handwriting of Burnette Hutton writing the name Sam Powell, again is very good agreement." Tr. 737.

At trial, Sam Powell testified in a somewhat confused fashion. He was unsure of the year in which he was born, and his age. He testified that he did not remember giving Hutton permission to fill out his ballot, but he also testified that his daughter had never done anything for him in handling his affairs that he had not told her to do. Tr. 438, 448.

Tyree then called Hutton as a defense witness. The government immediately represented that it had an "open" case file in its office regarding Hutton's perjury. Since it could hardly now claim that she had lied about whether she had signed her father's affidavit — its own expert witness had concluded that this part of her testimony was likely truthful — it now represented that it was considering a perjury prosecution on the question whether Hutton had indeed told the Assistant U.S. Attorney this true fact when she was interviewed. Tr. 854-55, 962. In light of this threat, Hutton, now provided with a second

court-appointed lawyer, quite sensibly declined to testify. Tr. 978.[4]

Since Hutton was thus made unavailable, petitioners sought to introduce her testimony from the selective prosecution hearing under Fed. R. Evid. 804(b)(1). They wished to introduce solely that part of her testimony in which she said she had signed Powell's affidavit with his consent. The government objected on the grounds that it had not had a full opportunity to cross-examine her. Tr. 975. The district court agreed and excluded Hutton's entire testimony. Tr. 1052-56.

Finally, in addition to the testimony regarding the seven ballots for which petitioners were indicted, the government introduced, over petitioners' strong and repeated objection, testimony related to nearly one hundred other ballots that Tyree had witnessed, although the prosecutor acknowledged that "I honestly can't prove anything illegally about these," and that "I can't prove that they're improper." Tr. 206, 207.

Following the close of evidence, the district court instructed the jury that in order to convict the petitioners it had to find, beyond a reasonable doubt, that they had "knowingly and willfully signed" a particular application or affidavit "without the knowledge and consent of that voter." But it almost immediately undermined that statement with an instruction regarding so-called "proxy voting" under state law:

> [T]here is no such thing in Alabama as proxy absentee voting. . . .
>
> Further, only the absentee voter himself, or herself, should sign the affidavit on the back side of the return-mail or affidavit envelope, addressed to the absentee election manager.

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[4]Despite the government's representation, Hutton was never prosecuted for any perjury.

Tr. 1289. After deliberating, the jury returned a verdict convicting petitioner Smith on all seven counts with which he had been charged and petitioner Tyree on all eleven counts with which she had been charged.

D. Petitioners' Sentencing

Over petitioners' objection that the court had initially advised them prior to trial that the Base Level for their offenses would be 6, Sent. Tr. 3-6, the court concluded that the appropriate Base Level was 12. *See* U.S. Sentencing Commission, Guidelines Manual § 2H2.1(a)(2) (1997). The court enhanced that Base Level by 6 additional levels for each petitioner, yielding an Offense Level of 18. The court then sentenced each petitioner to 33 months of imprisonment (the maximum permissible under the Guideline Imprisonment Range), two years of supervised release, forty hours of community service, and the required $50.00 per count assessment fee.

E. The Court of Appeals' Opinion

The Court of Appeals affirmed petitioner Smith's conviction on all counts, and affirmed petitioner Tyree's conviction on ten of the eleven counts with which she had been charged. (It reversed her conviction on Count 12 — involving the absentee ballot application of Shelton Braggs — for insufficient evidence.)

This Petition involves the Court of Appeals' rulings on five issues: the selective prosecution claim; the need to prove lack of voter consent as an element of the offenses charged; the exclusion of Burnette Hutton's testimony; the calculation of the base offense level under the Sentencing Guidelines; and the admission of evidence about other ballots witnessed by Tyree.

1. *Selective Prosecution.* On the question of selective prosecution, the Court of Appeals interpreted this Court's decision in *United States v. Armstrong*, 517 U.S. 456 (1996), to require petitioners to establish the two components of a

selective prosecution claim — discriminatory effect and discriminatory motive — by "clear and convincing evidence," App. 11, rather than by a preponderance of the evidence.

With respect to the question of discriminatory effect, the Court of Appeals acknowledged that "the mere possibility of future prosecutions, without more, is not a sufficient basis upon which to find that the requisite discriminatory effect or selectivity showing has not been clearly proven," App. 12, thus holding that the Magistrate Judge had applied the wrong legal standard in discounting the evidence he had found of similarly situated but unprosecuted individuals. But rather than remand for application of the correct legal standard, the Court of Appeals decided to conduct its own survey of the evidence — which necessarily omitted any judgments of witness credibility — and concluded that petitioners had failed to show the existence of similarly situated individuals or an improper motive. See App. 20-21 n.12.

The Court of Appeals announced a stringent standard for identifying "similarly situated" individuals for purposes of a selective prosecution claim:

> [W]e define a "similarly situated" person . . . as one who engaged in the same type of conduct, which means that the comparator committed the same basic crime in substantially the same manner as the defendant — so that any prosecution of that individual would have the same deterrence value and would be related in the same way to the Government's enforcement priorities and enforcement plan — and against whom the evidence was as strong or stronger than that against the defendant.

App. 15-16. In light of this newly derived standard, the Court of Appeals held that petitioners had to identify

> other individuals who voted twice or more in a federal election by applying for and casting fraudulent absentee

> ballots, *and* who forged the voter's signature or knowingly gave false information on a ballot affidavit or application, *and* that the voter whose signature those individuals signed denied voting, *and* against whom the government had evidence that was as strong as the evidence it had against Smith and Tyree.

App. 16 (emphasis in original). The Court of Appeals acknowledged that the record from the selective prosecution hearing included a dozen examples where an individual other than one of the petitioners witnessed ballots "in the name of [a] voter who stated" to the FBI during its investigation "that he did not vote." App. 18-19. Nonetheless, the Court of Appeals concluded that although "[t]hose individuals may have committed the same type of crimes as the defendants, . . . they are not similarly situated with respect to the number of crimes they committed," because, while some of them had fraudulently witnessed *two* ballots, Tyree had witnessed *six* and Smith had witnessed *three*. *See id.*

The Court of Appeals also rejected both the direct and circumstantial evidence of racial bias presented by petitioners with respect to the government's discriminatory motive.

The direct evidence concerned the prosecutor's *Batson* violation, see *supra* page 6. The circumstantial evidence concerned the involvement of the Alabama Attorney General in the federal prosecution. State prosecutors pursued state-court prosecutions against black defendants in those counties where the circuit court judges and local district attorneys were white, but federal charges in Greene County, where both the circuit court judge and the local prosecutor were black. The foreseeable, and arguably intended, consequence of this change in forums on the racial composition of the jury pool meant that rather than presenting its case to a heavily black jury in a county where the jurors were likely to be familiar with the nature of Greene County politics and high levels of absentee voting, the

state's pursuing a federal prosecution instead insured an overwhelmingly white jury pool drawn from counties with very different histories of absentee voting — juries whose members were therefore likely to be unfamiliar with, and suspicious of, customary Greene County politics.

The Court of Appeals rejected this evidence, concluding that the allegation of forum manipulation "rests . . . on an assumption that black defendants will not be treated in a just manner in federal court, an assumption which we reject." App. 22. With respect to the district court's finding of a *Batson* violation, the Court of Appeals stated that "[t]he only thing the [trial] court's rejection of the government's strike reveals is that the court did not agree with the government's observations [about the prospective juror]," App. 22. The Court of Appeals ignored the fact that the only legal basis for using such a "disagreement" to overcome the government's use of its peremptory challenge was a finding that the challenge had been used in a racially discriminatory manner and reasoned that, in any event, the government's misuse of its peremptory challenge provided "no basis for concluding that the underlying prosecution is motivated by bias." *Id.*

2. *Lack of Voter Consent.* Petitioners had argued that the district court's charge did not clearly require the jury to find that ballots had been cast without a voter's consent in order to find a violations of 42 U.S.C. §§ 1973i(c) or 1973i(e).

The Court of Appeals held, first, that lack of voter consent was not a necessary element of either offense. App. 23, 30-31. Thus, according to the court below, even if a voter expressly told another person to sign his absentee ballot affidavit, it would be a violation of federal criminal law, because, as a matter of Alabama state law a ballot that a voter has directed another individual to fill out on his behalf is not valid. *See* App. 25 (upholding Tyree's conviction for signing Braggs'

ballot regardless of whether the ballot was cast at his direction "because she is not Braggs.").

The Court of Appeals acknowledged that Counts 1 and 2 of the indictment — the conspiracy charge and the charge of voting more than once in violation of § 1973i(e) — had alleged that defendants had cast the identified ballots without the relevant voters' "knowledge and consent," but it held that even if this required the jury to be instructed on the question, the district court's charge was adequate when viewed "in its entirety." App. 33.

3. *Exclusion of Hutton testimony.* The Court of Appeals rejected petitioner Tyree's claim that the government's threats to prosecute Burnette Hutton for perjury at both the selective prosecution hearing and the trial had deprived her of her constitutional right to present witnesses in her defense. The Court did not comment at all on the government's behavior, but simply affirmed the district court's exclusion of Hutton's testimony on the basis that the government "had not had a full opportunity to cross-examine Hutton." App. 30.

4. *Calculation of the Base Offense Level Under the Sentencing Guidelines.* The Court of Appeals affirmed the district court's selection of a Base Offense Level of 12, rather than 6. The relevant sentencing guideline, Section 2H2.1(a)(2)-(3), provides for a base offense level of:

> (2) 12, if the obstruction occurred by forgery, fraud, theft, bribery, deceit, or other means, except as provided in (3) below; or
>
> (3) 6, if the defendant (A) solicited, demanded, accepted, or agreed to accept anything of value to vote, refrain from voting, vote for or against a particular candidate, or register to vote, (B) gave false information to establish eligibility to vote, or (C) voted more than once in a federal election.

Although the language of § 2H2.1(3)(B) and (C) tracked exactly the language of the statutes under which petitioners were convicted, the Court of Appeals held, without citation to any authority, that "[t]he language of (a)(2) applies in a case where forgery, fraud, theft, bribery, deceit, or other means are used to effect the vote of another person, or the vote another person was entitled to cast." App. 34. It restricted the language of (a)(3) to cases involving an individual who "acts unlawfully only with respect to his own vote." *Id.*

5. *Admission of evidence about Tyree's witnessing other ballots.* Notwithstanding the prosecutor's frank admission that "I can't prove anything illegal[] about these," the Court of Appeals approved the admission of testimony about 95 additional ballot affidavits witnessed by petitioner Tyree as "relevant to the conspiracy charge." App. 28.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant Certiorari to Clarify the Standards to be Applied to Claims of Selective Prosecution and to Resolve a Conflict With Both this Court's Decisions and Those of Other Circuits

In *United States v. Armstrong*, 517 U.S. 456 (1996), this Court squarely held that "[t]he requirements for a selective-prosecution claim draw on 'ordinary equal protection standards.'" *Id.* at 465 (quoting *Wayte v. United States,* 470 U.S. 598, 608 (1985)). And it further insisted that "[t]he similarly situated requirement does not make a selective prosecution claim impossible to prove." *Id.* at 466. The Court of Appeals' decision in this case flouts both those principles and conflicts with the approaches taken by other Courts of Appeals.

A. The Eleventh Circuit's Imposition of the "Clear and Convincing Evidence" Standard Conflicts with this Court's Decisions and the Decisions of Other Courts of Appeals

The Court of Appeals drew from this Court's statement in *Armstrong* that, "in order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present clear evidence to the contrary," *id.* at 465, the conclusion that defendants in selective prosecution cases must prove discriminatory purpose and effect not merely by a preponderance of the evidence but by the higher standard of clear and convincing evidence:

> Clear evidence sounds like more than just a preponderance, and evidence that is clear will be convincing. So, we interpret *Armstrong* as requiring the defendant to produce "clear" evidence or "clear and convincing" evidence which is the same thing.

App. 11. Not only does this reasoning ignore the fact that the standard of proof for establishing a selective prosecution claim was not at issue in *Armstrong*, but it conflates a word used by this Court in a very different context[5] with well-established

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[5]In *Armstrong*, this Court wrote that "'the presumption of regularity supports' . . . prosecutorial decisions and, 'in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties,'" 517 U.S. at 464, quoting from *Chemical Foundation, Inc. v. United States*, 272 U.S. 1, 14-15 (1926). But the Court did not announce the burden of proof standard and, in fact, went on explicitly to note that, notwithstanding the presumption of regularity, "the decision whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification,' *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962)." 517 U.S. at 464. In *Chemical Foundation* itself, the

legal terms of art. As Justice Scalia's opinion for the Court in *Allentown Mack Sales & Service v. N.L.R.B.*, 522 U.S. 359, 376 (1998), decisively noted:

> "Preponderance of the evidence" and "clear and convincing evidence" describe well known, contrasting standards of proof. To say . . . that a preponderance standard demands "clear and convincing manifestations, taken as a whole" is to convert that standard into a higher one.

In fact, no other court has ever, in any context, required litigants to prove an equal protection violation by clear and convincing evidence, rather than by a preponderance. *Wayte*'s citation of *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979); *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); and *Washington v. Davis*, 426 U.S. 229 (1976), as the "prior cases" that set out the "standards" to be followed, 470 U.S. at 608-09, makes clear that the normal preponderance of the evidence standard, applied in those cases, should apply to claims of selective prosecution as well.

The Eleventh Circuit's ruling here clearly conflicts with the approach taken by the Ninth Circuit in *United States v. Redondo-Lemos*, 955 F.2d 1296 (9th Cir. 1992), *appeal after*

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issue was whether actions taken by a State Department official to whom the President had delegated statutory authority were proper. The Court there discussed the presumption of regularity only after concluding that there was no reason to overturn the factual determination of the lower courts that the evidence failed to establish misrepresentations or fraud. 272 U.S. at 14. Despite its reference to the need for "clear evidence" to overcome the presumption of regularity, however, the Court did not address the burden of proof because the Circuit Court of Appeals had found "no evidence" at all to support the claim. *United States v. Chemical Foundation, Inc.*, 5 F.2d 191, 213 (3d Cir. 1925).

remand sub nom. United States v. Alcaraz-Peralta, 27 F.3d 439 (9th Cir. 1994). There, the Ninth Circuit stated that "[i]f the district court finds *by a preponderance of the evidence* that the prosecutor's charging or plea bargaining practice has a discriminatory impact, it must next determine whether the prosecutor was motivated by a discriminatory purpose in charging the defendant who is before the court," 955 F.2d at 1302 (emphasis added) and concluded that if, "after giving the government ample opportunity to present its side of the case, the district court finds *by a preponderance of the evidence* that there has been intentional discrimination on the basis of a suspect classification, it may then fashion a remedy to address the constitutional violation." *Id.* (emphasis added).

The Eleventh Circuit's approach in this case also conflicts with the general use of the preponderance of the evidence standard in cases involving equal protection claims against prosecutors or other law enforcement officials decided by the Second, Fourth, and Eighth Circuits. *See, e.g., United States v. Darden*, 70 F.3d 1507, 1531 (8th Cir. 1995) (in ruling on a *Batson* challenge, the trial court "must decide 'whether the party whose conduct is being challenged has demonstrated by a preponderance of the evidence that the strike would have nevertheless been exercised even if an improper factor had not motivated in part the decision to strike'"), *cert. denied*, 517 U.S. 1149 (1996), *quoting Jones v. Plaster*, 57 F.3d 417, 421 (4th Cir. 1995); *Eagleston v. Guido*, 41 F.3d 865, 870 (2d Cir. 1994) (trial court applied a preponderance of the evidence standard to equal protection claim alleging sex discrimination in police department's enforcement of policy regarding domestic violence), *cert. denied*, 516 U.S. 808 (1995).

B. The Standard Adopted Below for Identifying "Similarly Situated" Individuals When Adjudicating a Selective Prosecution Claim Departs Dramatically from Prior Caselaw and Forecloses the Claim as a Practical Matter

In its decisions articulating the elements of a selective-prosecution claim, this Court has repeatedly held that defendants must show that there were "similarly situated" individuals who were not prosecuted. *See, e.g.*, *Armstrong*, 517 U.S. at 465; *Wayte*, 470 U.S. at 605. The phrase is "*similarly* situated," not "identically situated in every respect," as this Court's decisions show.

Armstrong discussed this Court's unanimous decision in *Hunter v. Underwood*, 471 U.S. 222 (1985), to illustrate the operation of the "similarly situated" requirement:

> In *Hunter*, we invalidated a state law disenfranchising persons convicted of crimes involving moral turpitude. Our holding was consistent with ordinary equal protection principles, including the similarly situated requirement. There was . . . indisputable evidence that the state law had a discriminatory effect on blacks as compared to similarly situated whites: Blacks were by even the most modest estimates at least 1.7 times as likely as whites to suffer disfranchisement under the law in question . . . .

Armstrong, 517 U.S. at 466-67. Of course, blacks and whites were not *identically* situated in any respect except that they were citizens of Alabama subject to the disenfranchisement provision at issue in *Hunter*. Like the plaintiffs in *Hunter* — Victor Underwood (who was white) and Carmen Edwards (who was black) — everyone, black or white, who was convicted of one of the listed crimes was disenfranchised. The probability of disenfranchisement for both blacks and whites in this group was thus the same. The statistics cited by this Court were based upon the group of *all* citizens. But since this group includes both those who may have committed the specified offenses and those who did not, *Hunter* and *Armstrong* demonstrate that "similarly situated" cannot be synonymous with "identical." "Similar" means "comparable" in relevant ways.

In this case, however, the Eleventh Circuit invented a "similarly situated" requirement that, contrary to this Court's insistence that the requirement "does not make a selective prosecution claim impossible to prove," *Armstrong*, 517 U.S. at 466, does precisely that. It requires not only that a defendant identify other individuals who "committed the same basic crime in substantially the same manner as the defendant," but that a defendant show that prosecution of these other individuals "would have the same deterrence value and would be related in the same way to the Government's enforcement priorities and enforcement plan" and that the evidence against these individuals "was as strong or stronger than that against the defendant." App. 16.

There is simply no way that any defendant could prove what the Eleventh Circuit demands. Even once a defendant obtains discovery — a substantial hurdle that the petitioners in this case overcame — it is unclear how he can ever establish the relative deterrence values of different prosecutions, the actual scope of the Government's enforcement priorities or, without the ability to conduct a complete criminal investigation and trial itself, the relative strength of various cases before hypothetical juries.

The utter impossibility of the Eleventh Circuit's new standard is powerfully demonstrated by its application in this case. Petitioner Smith was convicted of illegalities with regard to *three* voters' absentee ballots. Petitioner Tyree was convicted of illegalities with regard to *six* voters' ballots. And yet, the Eleventh Circuit held that they were not similarly situated with respect to other individuals who had arguably committed precisely the same offense with respect to *two* ballots. *See* App. 18-19. Under such a standard, there will virtually *never* be "similarly situated" individuals.

Discussions of the "similarly situated" requirement by other Courts of Appeals take a markedly different tack. The

D.C. Circuit, for example, viewed the test as whether "others similarly situated have not generally been proceeded against because of conduct *of the type* forming the basis of the charge against [the defendants.]" *Attorney General v. Irish People, Inc.*, 684 F.2d 928 (D.C. Cir. 1982) (emphasis added) (*quoting Attorney Gen. v. INAC*, 530 F. Supp. 241, 254 (S.D.N.Y. 1981), *aff'd* 668 F.2d 159 (2d Cir. 1982)), *cert. denied*, 459 U.S. 1172 (1983). And the Eighth Circuit, in a prosecution for multiple voting, rejected other kinds of irregularities as not "sufficiently similar" to the offenses with which defendants were charged, but suggested that other acts of "absentee ballot forgery or fraud" would have been. *United States v. Parham*, 16 F.3d 844, 846 & n.3 (8th Cir. 1993).

II. This Court Should Grant Certiorari to Resolve a Conflict Among the Circuits Over the Construction of Two Criminal Provisions of the Voting Rights Act

The substantive offenses with which petitioners were charged are defined by 42 U.S.C. § 1973i(c) and 42 U.S.C. § 1973i(e). Section 1973i(c) provides, in pertinent part, that "[w]hoever knowingly or willfully gives false information as to his name, address, or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting" shall be guilty of a federal crime. In this case, one or both of the petitioners were alleged to have submitted absentee ballot applications and absentee ballots in the names of seven voters. A plain reading of the statutory language suggests that a person who facilitates the casting of an absentee ballot at the request of another does not give false information. But, according to the Eleventh Circuit, "nothing in § 1973i(c) requires that the information be given without the voter's permission." App. 23. Thus, according to the Eleventh Circuit, even if a qualified voter *expressly* requests that another person file an absentee

ballot request for him, complying with that request constitutes a federal crime.

Similarly, the Eleventh Circuit held in this case that section 1973i(e), which makes it a crime to "vot[e] more than once" in a federal election, is violated if an individual fills out and signs another individual's absentee ballot even if the qualified voter affirmatively consented to that being done: "What we have already held about [lack of a voter's consent] not being a necessary element of the § 1973i(c) offense applies as well to the § 1973i(e) offense." App. 30-31.

The approach taken below squarely conflicts with the view taken by the other Courts of Appeals to have reached this question. In *every* other reported case involving prosecutions under § 1973i(c) or (e) for absentee ballot irregularities,[6] courts have assumed that the government must show that applications were filed or votes were cast without the consent of the nominal voter. *See, e.g., United States v. Cole*, 41 F.3d 303, 308 (7th Cir. 1994) (affirming a conviction on the ground that "the absentee voters were not expressing their wills or preferences"), *cert. denied*, 516 U.S. 826 (1995); *United States v. Boards*, 10 F.3d 587, 590 (8th Cir. 1993) (finding "ample evidence from which a reasonable jury could find Boards . . . marked the voter's absentee ballot without authorization in violation of 42 U.S.C. § 1973i(c)"), *cert. denied*, 512 U.S. 1205 (1994). In fact, the Sixth Circuit held that section 1973i(e) would be unconstitutionally vague if it were applied to conduct that did not involve the lack of a nominal voter's consent. *See United States v. Salisbury*, 983 F.2d 1369, 1379 (6th Cir. 1993). Prior prosecutions in the Eleventh Circuit assumed precisely the same

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[6] The exception involves prosecutions under a different part of § 1973i(c) — the part that makes it a crime to pay or offer to pay a voter for his or her vote. Lack of consent to be paid is obviously irrelevant to a crime complete as of the time an offer to pay is made.

lack-of-consent requirement. *See, e.g., United States v. Gordon*, 817 F.2d at 1542; *United States v. Hogue*, 812 F.2d 1568, 1573-74 (11th Cir. 1987).

The construction adopted below is not merely in conflict with the pre-existing caselaw: it is a wrongheaded interpretation of Congressional intent. Consider, for example, the thousands of absentee ballot applications in the 2000 Florida presidential election on which Republican Party representatives inserted voter identification numbers that had inadvertently been left off preprinted forms. Even though these partisan workers were not among the categories of persons authorized under Florida law to submit absentee ballot requests, *see* Fla. Stat. Ann. § 101.62(1)(b), the Florida Supreme Court held that these applications were valid since there was no "fraud, gross negligence, or intentional wrongdoing." *Jacobs v. Seminole County Canvassing Board*, No. SC00-2447, 2000 Fla. LEXIS 2404, at *11 (Fla. Dec. 12, 2000). But under the Eleventh Circuit's interpretation in this case, the actions were violations of §§ 1973i(c) or 1973i(e). No one seriously expects United States Attorneys in Florida to bring prosecutions under these sections against the officials and party workers who filled in additional information on ballot applications that reflected the will and consent of qualified voters. The reason is obvious: Congress never meant to criminalize such conduct, and neither statute should be read to reach such a result.

In this case, the jury's verdict is entirely consistent with its having believed either that the voters involved consented to petitioners' involvement in their absentee ballot applications and absentee ballots or that petitioners believed in good faith that they had that consent. Indeed, only such a belief could support the jury's convicting petitioner Tyree on Counts 12 and 13 of the indictment, involving the application and ballot of Shelton Braggs since, as the Eleventh Circuit itself acknowledged, there was absolutely *no* evidence in the record of lack of consent.

This Court should grant certiorari both to resolve the conflict among the circuits and to prevent 42 U.S.C. § 1973i from becoming an "assimilative crimes" provision, *see* 18 U.S.C. § 13, under which individuals may be federally prosecuted for violating technical provisions of state election law to carry out a voter's wishes.

III. This Court Should Grant Certiorari to Address the Proper Application of the Sentencing Guidelines to the Offenses with which Petitioners were Charged

Appendix A to the Sentencing Guidelines makes § 2H2.1 applicable to a range of voting-related offenses, including 42 U.S.C. §§ 1973i(c) and 1973i(e), under the general heading of "Obstructing an Election or Registration." App. 63. That section of the Guidelines establishes three significantly different base offense levels:

> (1) 18, if the obstruction occurred by use of force or threat of force against person(s) or property; or
>
> (2) 12, if the obstruction occurred by forgery, fraud, theft, bribery, deceit, or other means, *except as provided in (3) below*; or
>
> (3) 6, if the defendant (A) solicited, demanded, accepted, or agreed to accept anything of value to vote, refrain from voting, vote for or against a particular candidate, or register to vote, (B) *gave false information to establish eligibility to vote*, or (C) *voted more than once in a federal election*.

U.S. Sentencing Commission, Guidelines Manual § 2H2.1 (1997) (emphasis added). The courts below acted as if § 2H2.1(a)(3) simply did not exist, and completely ignored the exceptions clause of § 2H2.1(a)(2).

The substantive offenses of which petitioners were convicted were (1) providing false information to establish eligibility to vote, 42 U.S.C. § 1973i(c) (Counts 3-13), and (2)

voting more than once in a federal election, 42 U.S.C. § 1973i(e) (Count 2). The conspiracy in which they were alleged to have been engaged was a conspiracy to commit those two substantive offenses. Clauses (3)(B) and (C) quoted above, providing for a base offense level of 6, track exactly the language of the statutory provisions under which petitioners were convicted. Thus, the applicable Sentencing Guideline clearly provides that the *particular* forms of fraud or deceit of which petitioners were convicted warrant a base level of 6, even though *other* forms of forgery, fraud, or deceit may carry a higher Base Offense Level. *See, e.g., Anderson v. United States*, 417 U.S. 211, 214-15 (1974) (casting fictitious votes on voting machines and then destroying poll slips to conceal the fraud); *United States v. Bowman*, 636 F.2d 1003, 1006-07 (5th Cir. 1981) (paying voters to vote for particular candidates).

The Court of Appeals simply ignored the identity between the statutory language of the offense for which petitioners were convicted and the language of § 2H2.1(a)(3)(B) and (C). Instead, without citation to any authority, it fashioned a distinction not reflected in the words of the Guidelines:

> The language of (a)(2) applies in a case where forgery, fraud, theft, bribery, deceit, or other means are used to effect the vote of another person, or the vote another person was entitled to cast. By contrast, the language of (a)(3) addresses an individual who acts unlawfully only with respect to his own vote--an individual who accepts payment to vote, gives false information to establish his own eligibility to vote, or votes more than once in his own name. The offenses for which Smith and Tyree were convicted involved the votes of other individuals . . . .

App. 34.

In *Chapman v. United States*, 500 U.S. 453, 457 (1991), this Court noted that the applicable Sentencing Guideline provision "parallel[ed] the statutory language." *See also id.* at

470 n.6 (Stevens & Marshall, JJ., dissenting). This Court should grant certiorari to make clear that when a sentencing court is faced with different base offense levels, and the Sentencing Commission has distinguished among statutory offenses by using their language in establishing base offense levels, the sentencing court is bound to apply the base offense level identified by the Sentencing Commission.

IV. This Court Should Grant Certiorari to Restore the Protections of the Fifth and Sixth Amendments to Petitioner Tyree

Petitioner Tyree has a constitutional right, under the compulsory process clause of the Sixth Amendment and the due process clause of the Fifth Amendment to "present [her] own witnesses to establish a defense." *Washington v. Texas*, 388 U.S. 14, 19 (1967). "[S]ubstantial government interference with a defense witness's free and unhampered choice to testify violates due process" rights of the defendant. *United States v. Hammond*, 598 F.2d 1008, 1012 (5th Cir. 1979). In *Webb v. Texas*, 409 U.S. 95, 98 (1972), this Court held unanimously that when threats of prosecution for perjury "effectively drove [a critical] witness off the stand," the defendant was deprived of "due process of law under the Fourteenth Amendment."

In this case, the government substantially interfered with Tyree's ability to present the testimony of Burnette Hutton. Hutton was prepared to testify that she had signed her father's absentee ballot affidavit (he was illiterate) with his consent. That testimony, if believed, might have led the jury to acquit Tyree on Count 7, which involved her allegedly having signed Powell's absentee ballot application. Presented with this possibility by her testimony at the selective prosecution hearing, the government reacted by both trying to intimidate Hutton on the stand — through the extraordinary stratagem of demanding that she provide handwriting exemplars in public and without notice — and threatening to indict her for perjury. In the end,

the government did not indict her for perjury; indeed, handwriting exemplars later obtained disproved the government's hypothesis that she had lied about signing the ballot affidavit. Nevertheless, the government prevented Hutton's sworn pre-trial testimony from being presented to the jury on the ground that its cross-examination had been curtailed, albeit by its own conduct.

Given the government's threats at the selective prosecution hearing, Hutton was virtually compelled to invoke her Fifth Amendment rights and terminate her testimony. Thus, Tyree was deprived of a potentially critical witness on the question of Sam Powell's consent. The federal courts routinely refuse to allow criminal defendants to prevent the introduction of prior testimony pursuant to Fed. R. Evid. 804(b)(1) on the ground that did not have the opportunity for cross-examination where the witness's unavailability for cross-examination resulted from intimidation by the defendant. *See, e.g., Magouirk v. Warden*, No. 99-30594 (5th Cir. Jan. 15, 2001) and cases cited. Consistent with *Webb*, the same rule should apply to the government. Accordingly, this Court should grant certiorari to reaffirm the rule ignored by the Eleventh Circuit: when the government intimidates a defense witness, driving that witness from the stand and preventing the jury from hearing testimony that the government's own expert acknowledges to be truthful, it violates a defendant's rights under the Sixth Amendment and the due process clause of the Fifth Amendment.

V. The Court Should Grant Review to Resolve the Conflict Between the Decision Below and Rulings of other Circuits that Inherently Prejudicial Evidence of Similar Acts by a Criminal Defendant May Be Admitted Only if the Acts are Shown to be Unlawful

Petitioners were charged with crimes relating to the casting of seven voters' absentee ballots. Nevertheless, over their

strong objection on grounds of both relevance and prejudice, the prosecution introduced evidence regarding at least 95 other absentee ballots witnessed by Connie Tyree. The prosecutor conceded that the government could not prove "anything" illegal, or even "improper" about these ballots.[7] The inherently prejudicial danger of this evidence — the suggestion that anyone who witnessed as many ballots as Tyree did must have been doing something wrong — is obvious. But the Court of Appeals held the evidence was relevant to the conspiracy count of the indictment, even though the conduct was legal.

This holding conflicts with the decisions of other Circuits requiring that evidence that purports to show that defendants have committed similar acts may be admitted only if the jury is provided with a basis for concluding that the other acts were unlawful and were similar to those charged along the relevant dimension.

Thus, in *United States v. Guerrero*, 650 F.2d 728 (5th Cir. 1981), the court reversed the conviction of a doctor who had been charged with dispensing controlled medications outside the usual course of professional medical practice because he had been prejudiced by the introduction of evidence regarding other prescriptions as to which no illegality or impropriety was shown. "The common characteristic" rendering such evidence relevant and admissible, the Fifth Circuit held, "must be the significant one for the purpose of the inquiry at hand." *Id.* at 733 (internal citations omitted). Sales that were not

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[7]Indeed, encouraging and assisting absentee voting is a constitutionally protected activity. *See, e.g., Smith v. Meese*, 821 F.2d 1484 (11th Cir. 1987). The Magistrate Judge found, as a matter of fact, that absentee voting in Greene County was critical to black citizens' ability to participate in the electoral process. App. 41.

intentionally outside the usual practice were not "in any way relevant" to the question of the intent behind the charged sale. *Id.* at 734.

Guerrero was followed in *United States v. Anderson*, 933 F.2d 1261 (5th Cir. 1991), where the Court of Appeals directed the trial court to determine whether the evidence of other fires was sufficient to permit the jury to conclude, by a preponderance, that they were arson incidents in which the defendant was involved. The same principles have been given application by other panels of the Eleventh Circuit. See, *e.g.*, *United States v. Veltmann*, 6 F.3d 1483, 1499 (11th Cir. 1993) ("For extrinsic offenses to be relevant to an issue other than character, they must be shown to be *offenses*, and must also be *similar* to the charged offense") (emphasis in original); *United States v. Dothard*, 666 F.2d 498, 501-05 (11th Cir. 1982). *See also United States v. Sullivan*, 919 F.2d 1403, 1416-17 (10th Cir. 1990) (general assertion by prosecutor that evidence was relevant because it was part of history of conspiracy was insufficient justification for its admission).

In this case, the courts below neither determined that the jury could have found that Tyree improperly witnessed the other ballots — a finding it could hardly have made in light of the prosecutor's concession — nor weighed the probative value of the evidence against the risk of prejudice. Here that risk was realized. This Court should grant the writ to resolve the conflict between the decision below and those cited in the preceding paragraph.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeals

[Caption Omitted in Printing]

(October 25, 2000)

Before CARNES, BARKETT and MARCUS, Circuit Judges.

CARNES, Circuit Judge:

This appeal arises out of the convictions of Frank Smith and Connie Tyree on a number of federal criminal counts relating to violation of absentee voter laws in connection with the November 1994 general election in Greene County, Alabama. The two of them raise numerous issues on appeal, contending that: (1) the indictment should have been dismissed on the ground of selective prosecution based on race and political affiliation; (2) there was insufficient evidence to convict Tyree on two of the counts of giving false information in violation of 42 U.S.C. § 1973i(c); (3) the United States Sentencing Guidelines were misapplied in sentencing Smith and Tyree; (4) they were convicted on multiplicitous counts; (5) certain evidence relating to absentee ballot affidavits witnessed by Tyree should not have been admitted into evidence; (6) the jury was erroneously instructed regarding Alabama law and "proxy" voting; and (7) Tyree was denied her constitutional right under the Fifth and Sixth Amendments to present witnesses in her defense.

For the reasons set forth below, we conclude that all of Smith's arguments miss the mark, and his convictions and sentence are due to be affirmed in all respects. All but one of Tyree's arguments miss. Her conviction is due to be affirmed except on Count 12; reversal of that part of her conviction makes it necessary that she be re-sentenced.

I. PROCEDURAL HISTORY

In January of 1997, Frank Smith and Connie Tyree were charged in a thirteen-count indictment with offenses arising out of the November 8, 1994 general election in Greene County, Alabama. Among the offices to be filled in that election was the office of Member of the United States House of Representatives, a fact which supplies a necessary element of the federal charges. Count 1 of the indictment charged Smith and Tyree with conspiring, in violation of 18 U.S.C. § 371, to vote more than once in a general election by applying for and casting fraudulent absentee ballots in the names of voters without the voters' knowledge and consent, in violation of 42 U.S.C. § 1973i(e), and with conspiring to knowingly and willfully give false information as to a voter's name and address for the purpose of establishing the voter's eligibility to vote in the November 8, 1994 general election, in violation of 42 U.S.C. § 1973i(c).[1]

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[1]42 U.S.C. § 1973i(e) reads as follows:

(e) Voting more than once

(1) Whoever votes more than once in an election referred to in paragraph (2) shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) The prohibition of this subsection applies with respect to any general, special, or primary election held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

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(3) As used in this subsection, the term "votes more than once" does not include the casting of an additional ballot if all prior ballots of that voter were invalidated, nor does it include the voting in two jurisdictions under section 1973aa-1 of this title, to the extent two ballots are not cast for an election to the same candidacy or office.

42 U.S.C. § 1973i(e).

42 U.S.C. § 1973i(c) reads as follows:

(c) False information in registering or voting; penalties

Whoever knowingly or willfully gives false information as to his name, address, or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years, or both: Provided, however, That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

42 U.S.C. § 1973i(c).

The terms "vote" and "voting" are defined as follows:

Count 2 charged Smith and Tyree with voting more than once and aiding and abetting each other and others in the same offense, in violation of 42 U.S.C. § 1973i(e) and 18 U.S.C. § 2. That count alleged that Smith and Tyree voted the absentee ballots of Shelton Braggs, Willie C. Carter, Jr., Cassandra Lee Carter, Sam Powell, Eddie Gilmore, Angela Hill and Michael Hunter without the knowledge and consent of those voters. Counts 3 through 13 charged either Smith or Tyree or both with giving false information on an application for absentee ballot or on an affidavit of absentee voter concerning the names and addresses of Hill, Gilmore, Willie Carter, Cassandra Carter, Braggs and Powell, and with aiding and abetting each other and others in the same offense in violation of 42 U.S.C. § 1973i(c) and 18 U.S.C. § 2.[2]

> all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

42 U.S.C. § 1973l (c)(1).

[2] Specifically, Counts 3 and 4 charged Tyree with giving and aiding and abetting others to give false information on an application for an absentee ballot and on an affidavit of absentee voter, respectively, concerning the name and address of Angela Hill, in violation of 42 U.S.C. § 1973i(c) and 18 U.S.C. § 2. Count 5 charged Tyree with giving and aiding and abetting others to give

Smith and Tyree, who are black, filed a motion to dismiss the indictment on the ground of selective prosecution on the basis of race and political affiliation. After a four and a half day evidentiary hearing, the magistrate judge recommended that the motion to dismiss be denied. Adopting that recommendation,

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false information on an application for absentee ballot concerning the name and address of Eddie T. Gilmore, in violation of 42 U.S.C. § 1973i(c) and 18 U.S.C. § 2. Count 6 charged Smith and Tyree with giving and aiding and abetting others to give false information on an affidavit of absentee voter concerning the name and address of Gilmore, in violation of 42 U.S.C. § 1973i(c) and 18 U.S.C. § 2. Count 7 charged Tyree with giving and aiding and abetting others to give false information on an affidavit of absentee voter concerning the name of Sam Powell, in violation of 42 U.S.C. § 1973i(c) and 18 U.S.C. § 2. Count 8 charged Smith with giving and aiding and abetting others to give false information on an application for absentee ballot concerning the name and address of Cassandra Carter, in violation of 42 U.S.C. § 1973i(c) and 18 U.S.C. § 2. Count 9 charged Smith and Tyree with giving and aiding and abetting others to give false information on an affidavit of absentee voter concerning the name and address of Cassandra Carter, in violation of 42 U.S.C. § 1973i(c) and 18 U.S.C. § 2. Count 10 charged Smith with giving and aiding and abetting others to give false information on an application for absentee ballot concerning the name of Willie C. Carter, Jr., in violation of 42 U.S.C. § 1973i(c) and 18 U.S.C. § 2. Count 11 charged Smith and Tyree with giving and aiding and abetting others to give false information on an affidavit of absentee voter concerning the name of Willie C. Carter, Jr., in violation of 42 U.S.C. § 1973i(c) and 18 U.S.C. § 2. Counts 12 and 13 charged Tyree with giving and aiding and abetting others to give false information on an application for absentee ballot and on an affidavit of absentee voter, respectively, concerning the name and address of Shelton Braggs, in violation of 42 U.S.C. § 1973i(c) and 18 U.S.C. § 2.

the district court denied the motion. After a seven day trial, the jury found Smith guilty on all seven counts with which he had been charged and Tyree guilty on all eleven counts with which she had been charged.[3]

At sentencing, the court applied the United States Sentencing Guidelines ("U.S.S.G.") § 2H2.1 and concluded that the appropriate base offense level for Smith and Tyree's offenses was 12. The court then enhanced Smith's sentence two levels for obstruction of justice pursuant to U.S.S.G. § 3C1.1, enhanced Tyree's sentence two levels for abuse of a position of trust pursuant to U.S.S.G. § 3B1.3, and enhanced both sentences four levels for their status as organizers or leaders of criminal activity involving five or more participants pursuant to U.S.S.G. § 3B1.1(a). Those enhancements brought the total offense level for both Smith and Tyree to 18. The court then sentenced Smith and Tyree to thirty-three months of imprisonment on each count to run concurrently, two years of supervised release upon release from custody, forty hours of community service, and the required $50.00 per count assessment fee. They both appealed.

II. STANDARDS OF REVIEW

A district court's denial of a motion to dismiss on the ground of selective prosecution involves both conclusions of law and findings of fact. We review the court's factual findings for clear error and its legal conclusions de novo. See *Newell v. Prudential Ins. Co. of America*, 904 F.2d 644, 649 (11th

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[3]On Count 2, Smith was found guilty of voting more than once with respect to Cassandra Carter, Willie C. Carter and Eddie Gilmore. Tyree was found guilty on Count 2 with respect to Angela Hill, Michael Hunter, Sam Powell, Cassandra Carter, Shelton Braggs, Willie C. Carter and Eddie Gilmore.

Cir.1990); *United States v. Jones*, 52 F.3d 924, 927 (11th Cir.1995) (*de novo* review of district court decision on selective prosecution); *United States v. Brundidge*, 170 F.3d 1350, 1352 (11th Cir.1999) (with motions involving mixed questions of law and fact "we review the factual findings of the district court for clear error and the application of the law to those facts *de novo*.").

We review challenges to the sufficiency of the evidence *de novo*, viewing the evidence in the light most favorable to the government and drawing all reasonable inferences from the evidence in favor and in support of the jury verdict. See *United States v. Starke*, 62 F.3d 1374, 1380 (11th Cir.1995); *United States v. Thomas*, 8 F.3d 1552, 1556 (11th Cir.1993).

We review the district court's application of the Sentencing Guidelines *de novo* and its findings of fact for clear error. See 18 U.S.C. § 3742(d) ("The court of appeals ... shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts."); *United States v. Gregg*, 179 F.3d 1312, 1316 (11th Cir.1999) (factual findings that supported obstruction of justice enhancement reviewed for clear error).

We review whether counts in an indictment are multiplicitous *de novo*. See *United States v. Cluck*, 143 F.3d 174, 179 (5th Cir.1998).

We review the district court's evidentiary rulings under an abuse of discretion standard. See *United States v. Tokars*, 95 F.3d 1520, 1530 (11th Cir.1996).

We review a district court's jury instruction deferentially:

> So long as the instructions accurately reflect the law, the trial judge is given wide discretion as to the style and wording employed in the instructions. On appeal, we examine whether the jury charges, considered as a whole, sufficiently instructed the jury so that the jurors understood the issues and were not misled. However, if no objection to the instructions was raised at trial, we only review for plain error.

Starke, 62 F.3d at 1380 (citations and quotations omitted); see also *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1072 (11th Cir.1996); *Goulah v. Ford Motor Co.*, 118 F.3d 1478, 1485 (11th Cir.1997); Jennings v. BIC Corp., 181 F.3d 1250, 1254 (11th Cir.1999).

III. ANALYSIS

A. WHETHER THE DISTRICT COURT ERRED BY FAILING TO GRANT SMITH AND TYREE'S MOTION TO DISMISS THE INDICTMENT ON THE GROUND OF SELECTIVE PROSECUTION BASED ON RACE AND POLITICAL AFFILIATION

The reality resulting from limited law enforcement and judicial resources is that not every criminal violation of the United States Code can be prosecuted. The decision as to which crimes and criminals to prosecute is entrusted by the Constitution not to the judiciary, but to the executive who is charged with seeing that laws are enforced. See U.S. CONST. ART. II, § 3 ("he shall take Care that the Laws be faithfully executed"). The judiciary cannot interfere with a prosecutor's exercise of charging discretion, except in narrow circumstances where it is necessary to do so in order to discharge the judicial function of interpreting and applying the Constitution.

Prosecutors are given broad discretion in deciding against whom to focus limited prosecutorial resources, and a strong "presumption of regularity supports ... [those] decisions." *United States v. Armstrong*, 517 U.S. 456, 464, 116 S. Ct. 1480, 1486, 134 L. Ed. 2d 687 (1996) (citations and quotations omitted). But they must exercise their charging discretion within constitutional constraints, including those "imposed by the equal protection component of the Due Process Clause of the Fifth Amendment." See *id.* Under that clause, "the decision whether to prosecute may not be based on an unjustifiable standard such as race, religion, or other arbitrary classification." Id. (citation and quotation omitted). "A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." *Id.* at 463, 116 S. Ct. at 1486.

Defendants bear a "demanding" burden when seeking to establish that they are being selectively prosecuted in an unconstitutional manner. *Id.* "In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present *clear* evidence to the contrary." *Id.* at 465, 116 S. Ct. at 1486-87 (emphasis added) (citations and quotations omitted). The Supreme Court has explained the pragmatic and policy as well as constitutional reasons behind the substantial deference given to prosecutors:

> Judicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. It also stems from a concern

> not to unnecessarily impair the performance of a core executive constitutional function. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy.

Id. (citations and quotations omitted).

In accordance with this judicial deference to prosecutorial discretion, we are to evaluate a selective prosecution claim using "ordinary equal protection standards." *Id.* (citations and quotations omitted). Specifically:

> The claimant must demonstrate that the federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose. To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted.

Id. (citations and quotations omitted). With these principles in mind we will turn to Smith and Tyree's arguments that the district court should have granted their motion to dismiss on the ground of selective prosecution.[4]

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[4]Before doing so, we note that the government complains vehemently about having been required to disclose its investigative files to the defendants and being subjected to a four and a half day evidentiary hearing on the selective prosecution motion. It argues that the defendants did not make a sufficient showing to justify the evidentiary hearing or the intrusion into the prosecution's files. If that argument is valid, there is reason to be

Smith and Tyree first argue that they are only required to establish the two components of a selective prosecution case--discriminatory effect and motive--by a preponderance of the evidence, so it was error for the district court to require them to shoulder a clear and convincing evidence burden of persuasion. The issue boils down to interpreting what the Supreme Court meant when it said in *Armstrong*, that "in order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present *clear* evidence to the contrary...." *Id.* at 465, 116 S. Ct. at 1486 (emphasis added) (citations and quotations omitted). Clear evidence sounds like more than just a preponderance, and evidence that is clear will be convincing. So, we interpret *Armstrong* as requiring the defendant to produce "clear" evidence or "clear and convincing" evidence which is the same thing. The district court did not err in that respect.

Next, Smith and Tyree contend that the district court erred by relying on the possibility of future prosecutions to conclude that they had not proven they were singled out for prosecution.

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concerned. See generally *Armstrong*, 517 U.S. at 465, 116 S. Ct. at 1486 ("Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." (citations and quotations omitted)). But the government did not attempt to have us review the district court's decision in these respects at the time, has not cross-appealed any of those rulings, and does not ask us to disregard the resulting evidence which it contends shows there was no basis to the selective prosecution motion. As a result, we will consider all of the evidence in the record, but we do so without implying that we think the district court properly permitted the extensive inquiry it did based upon the showing the defendants had made.

The magistrate judge, in a report and recommendation adopted in full by the district court, concluded that the defendants had failed to establish either prong of a selective prosecution claim. In regard to the first prong, which he called the "selectivity prong," the magistrate judge said that "it is certainly true that there is evidence in the record indicating" that others who had not been prosecuted had engaged in fraudulent absentee ballot voting activities, including forging voters' signatures and altering ballots. But the magistrate judge reasoned that because the government's investigation was still active at the time of the motion, those others might be prosecuted at some time before the statute of limitations ran out. On that basis, he concluded that the defendants had failed to establish the first prong of the required showing.

We agree with the defendants that the mere possibility of future prosecutions, without more, is not a sufficient basis upon which to find that the requisite discriminatory effect or selectivity showing has not been clearly proven. Otherwise, a selective prosecution claim might not be ripe for decision until the statute of limitations runs out. We recognize, of course, that prosecutors have to start somewhere, and everyone engaged in the same type of wrongdoing often will not be charged simultaneously. There can be all kinds of practical reasons, including differences in evidence or in the progress of the investigation, which cause the government to prosecute some criminals before others for the same crime. But those legitimate reasons can be stated where they exist, and they will be sufficient to establish that any selectivity that has been exercised was not the result of unconstitutional motives. We do not rule out the possibility in a proper case of a remand to supplement the record with material facts relating to prosecutions that occur after the district court has denied a selective prosecution motion, but we do not think a remand is necessary in this case. The statute of limitations has now run, and we will assume for present purposes that no prosecution of

anyone outside the groups to which Smith and Tyree claim membership will ever be prosecuted in connection with illegal activities relating to the November 8, 1994 election in Greene County.[5]

We turn now to the heart of Smith and Tyree's argument which is that they presented sufficient evidence to prove both prongs of a valid selective prosecution claim. As we have already stated, in order to establish their selective prosecution claim, they were required to show that their prosecution had a discriminatory effect, i.e., that similarly situated individuals were not prosecuted, and they were also required to show that the difference in treatment, or selectivity of the prosecution, was motivated by a discriminatory purpose. See *Armstrong*, 517 U.S. at 465, 116 S. Ct. at 1486-87. We recognize that the nature of the two prongs of a selective prosecution showing are such that they will often overlap to some extent, but we discuss them separately beginning with the selectivity or discriminatory effect prong.

Smith and Tyree attempted to establish discriminatory effect by showing that individuals belonging to two groups committed voting rights violations like the ones charged against Smith and Tyree, but were not prosecuted. One group, defined by race, consists of certain named white residents of Greene County or Wilcox County. The other group includes residents

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[5]While this case was on appeal, counsel for Smith and Tyree filed what they describe as a FED. R.APP. P. 28(j) letter informing us of various matters, including the fact that the statute of limitations has run. The letter says that since Smith and Tyree were convicted nine other Greene County residents have been indicted in connection with alleged illegal activities relating to the same election, but all are black and are supporters of the same political faction as Smith and Tyree.

who like Smith and Tyree are black. But those black people are different, Smith and Tyree contend, because they belong to a different political faction. Smith and Tyree are members of the Alabama New South Coalition which they point out has fewer white members than the biracial Citizens for a Better Greene County ("CBGC").[6]The two groups who supposedly received more favorable treatment overlap to the extent that some or all of the whites in the first group are members of the CBGC. Predicating a selective prosecution claim on the contention that members of the defendants' own race were not prosecuted because they were politically allied with whites is a novel approach. We need not decide whether such an allegation is a sufficient basis for a selective prosecution claim, but instead will assume for purposes of discussion that it can be. Even assuming that a viable selective prosecution claim can be made based on discriminatory treatment among African-Americans, Smith and Tyree have failed to show that their prosecution had a discriminatory effect--that similarly situated individuals were not prosecuted--and they have also failed to show that the federal prosecutorial policy was motivated by a discriminatory purpose.

The beginning step in comparing the prosecution of the defendants with the non-prosecution of those who were "similarly situated" is to determine who, if anyone, was similarly situated with the defendants. Neither this Court nor

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[6]Smith and Tyree's descriptions of the two political factions is as follows: "The rival blocs might be described as, on one side, a black majority faction, affiliated with the Alabama New South Coalition, and, on the other, an ostensibly nonpartisan and biracial group, Citizens for a Better Greene County, founded by political opponents of the black majority faction and backed by most of the remaining white power structure within the County." Appellants' Brief at 5-6 (internal marks and citations omitted).

the Supreme Court has definitively explained what constitutes a "similarly situated" individual in this context,[7] but the definition is informed by the Supreme Court's recognition of legitimate factors that may motivate a prosecutor's decision to bring a case against a particular defendant. Those factors include "the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan." *Armstrong*, 517 U.S. at 465, 116 S. Ct. at 1486.

In light of those legitimate factors, we define a "similarly situated" person for selective prosecution purposes as one who engaged in the same type of conduct, which means that the

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[7]In *United States v. Johnson*, 577 F.2d 1304, 1308 (5th Cir.1978), we quoted favorably from a Second Circuit opinion which referred to "conduct of the type forming the basis of the charge against" the defendant, but in actually applying the test we focused more narrowly, concluding there was no selective prosecution because "the conduct for which he was prosecuted is not ordinarily ignored." *Id.* at 1308-09. In *United States v. Pleasant*, 730 F.2d 657, 663 (11th Cir.1984), we continued that focus, asking whether the defendant had carried his burden of showing that he "has been singled out for prosecution while others similarly situated and committing the same acts have not been prosecuted." (emphasis added). Our opinion in *United States v. Gordon*, 817 F.2d 1538, 1539-40 (11th Cir.1987), says that the defendant must prove that "others similarly situated have not generally been proceeded against for the type of conduct with which he has been charged." We do not view these prior pronouncements as being inconsistent either with each other or with our statements in this opinion. "Conduct of the type forming the basis of the charge" against a defendant will be "the conduct for which he was prosecuted," and "others similarly situated and committing the same acts" will be guilty of the same crimes as the defendant.

comparator committed the same basic crime in substantially the same manner as the defendant--so that any prosecution of that individual would have the same deterrence value and would be related in the same way to the Government's enforcement priorities and enforcement plan--and against whom the evidence was as strong or stronger than that against the defendant. Consequently, for Smith and Tyree to establish selective prosecution, they must show that there are other individuals who voted twice or more in a federal election by applying for and casting fraudulent absentee ballots, *and* who forged the voter's signature or knowingly gave false information on a ballot affidavit or application, *and* that the voter whose signature those individuals signed denied voting, *and* against whom the government had evidence that was as strong as the evidence it had against Smith and Tyree. That is the case the government built against Smith and Tyree, and in order to prevail on their selective prosecution claim Smith and Tyree must establish that the government could prove beyond a reasonable doubt that someone else had engaged in the same type of conduct, committing the same crime in that or substantially the same manner.

A painstaking review of the record reveals that Smith and Tyree did not carry their burden. In their initial brief Smith and Tyree point to Patsy Rankins and Betty Banks, both of whom are white, as people who were similarly situated but escaped prosecution. But what they say that Rankins and Banks did is not the same as the conduct for which Smith and Tyree were convicted. Rankins allegedly harassed voters, jerked on the arm of one voter and tried to influence that voter's vote. Banks allegedly went into the post office, handled absentee ballots, and took pictures of the ballots. Neither one of them is alleged to have written false information or forged names on an absentee application or affidavit, or to have voted more than once.

Smith and Tyree also allege that other individuals (most if not all of whom are black but none of whom were affiliated with the Alabama New South Coalition), engaged in activities such as paying people to vote, changing a vote on a ballot, and stealing a ballot out of a mailbox. While that alleged conduct is serious, the Supreme Court has noted "the Government's enforcement priorities" as a factor that could legitimately distinguish between those who are prosecuted and those who are not. See *Armstrong*, 517 U.S. at 465, 116 S. Ct. at 1486. Choosing enforcement priorities is an important part "of a core executive constitutional function," and the process is "not readily susceptible to the kind of analysis the courts are competent to undertake." *Id.* (citations and quotations omitted). In other words, we are neither authorized nor competent to second guess the government on which among the universe of different crimes should be prosecuted. See *United States v. Parham*, 16 F.3d 844, 846-47, 846 n. 3 (8th Cir.1994) (holding that alleged irregularities, including harassing and intimidating black voters, were not sufficiently similar to act of forging names on absentee ballots for which defendants were prosecuted and thus defendants did not make out a *prima facie* case of selective prosecution).[8] Moreover, at least some of this alleged misconduct by others involved single instances and not the repeated criminal conduct for which the defendants were

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[8]We note that the Eighth Circuit misread our decision in *United States v. Gordon*, 817 F.2d 1538, 1540 (11th Cir.1987), *rev'd in part on other grounds*, 836 F.2d 1312 (11th Cir.1988), to the extent that it characterized the result as "selective prosecution found where others had not been prosecuted for the same offense." *Parham*, 16 F.3d at 847. We did not find selective prosecution in *Gordon* and held only that the defendant was "entitled to an evidentiary hearing on the selective prosecution claim so the full facts [would] be known." *Gordon*, 817 F.2d at 1540.

prosecuted. As we will explain shortly, that does make a difference.

Focusing now on the crimes for which Smith and Tyree were prosecuted, there is some evidence that other individuals signed another voter's signature to, or filled out the administrative information on, an application for absentee ballot or the affidavit of absentee voter that was not their own. Larry Nelson, the defendants' handwriting expert, testified at the evidentiary hearing that he found multiple instances where the voter's signature or the administrative information was completed by someone other than the voter and other than Smith or Tyree. But none of those voters testified that they had not voted the ballot that was cast in their name or authorized someone else to do so.

Smith and Tyree's briefs to this Court fail to face up to that type of difference. For example, in their initial brief, they point to Rosie Carpenter, Lenora Burks and Annie Thomas as individuals who witnessed a substantial number of absentee ballots, and who therefore should have been targets of the investigation. Yet nowhere do Smith and Tyree point to statements (much less testimony) from any of those voters whose absentee ballots were witnessed by Carpenter, Burks or Thomas indicating that those voters themselves did not actually vote their ballots regardless of who witnessed them. Witnessing large numbers of absentee ballots is not, in and of itself, a crime.

Our careful review of the record found some evidence (whether it is clear is another matter) in the FBI reports that an absentee ballot was voted in the name of someone who said that he did not cast it. That evidence included four instances where an individual witnessed two ballots and the voters in whose names the ballots were cast told the FBI that they did not vote, and eight instances where an individual witnessed one ballot in

the name of the voter who stated that he did not vote.[9] Those individuals may have committed the same type of crimes as the defendants, but they are not similarly situated with respect to the number of crimes they committed.

The prosecution had, and presented at trial, sufficient evidence to prove beyond a reasonable doubt that Tyree fraudulently applied for or fraudulently cast, or both, absentee ballots in the names of seven voters: Hill, Gilmore, Powell, Cassandra Carter, Willie Carter, Braggs and Hunter.[10] And the same is true of the evidence the prosecution had and presented at trial to prove that Smith committed those same crimes involving three voters: Gilmore, Cassandra Carter and Willie Carter. The prosecution had, and presented at trial, sufficient evidence to prove beyond a reasonable doubt that Tyree knowingly or willfully gave false information to establish the eligibility to vote ballots in the names of six voters: Hill,

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[9]We note that several of the FBI investigative reports which this Court examined seemed internally inconsistent with respect to whether the voter did or did not vote. We did our best to identify similarly situated individuals, but as the Supreme Court noted in *Armstrong*, judicial deference to prosecutors is based on the fact that this kind of investigative and prosecutorial analysis is better conducted by prosecutors than by judges. See *Armstrong*, 517 U.S. at 465, 116 S. Ct. at 1486. To the extent any similarly situated individuals exist that we were unable to identify from the record and briefs, that inability reflects a failure on the part of Smith and Tyree to carry their burden.

[10]Later in this opinion, we will reverse Tyree's conviction on Count 12, giving false information with respect to the name and address of Braggs on an application of absentee ballot, for insufficient evidence, but affirm her conviction on Count 13, giving false information with respect to the name and address of Braggs on an affidavit of absentee voter. See *infra* Part III.B.

Gilmore, Powell, Braggs, Cassandra Carter and Willie Carter.[11] And the same is true of the evidence that the prosecution had and presented at trial to prove that Smith committed the same crimes involving three voters: Gilmore, Cassandra Carter and Willie Carter.

The government can legitimately place a higher priority on prosecuting someone who commits an offense three, six or seven times, than someone who commits an offense once or twice, especially when the offense is a non-violent one. Likewise, the willingness of a jury to convict a defendant of a crime may increase with the number of times that defendant has committed the crime.

Finally, we do not know from the record the strength of the evidence that others may have committed similar crimes, because saying something is one thing and testifying to it is another. We do know that the evidence Smith and Tyree committed these crimes was strong enough to convince a jury beyond a reasonable doubt.

For all of these reasons, Smith and Tyree failed to carry their burden that the others who may have committed crimes in connection with the November 8, 1994 general election were similarly situated to them. Smith and Tyree failed to carry their burden of establishing the discriminatory effect or selectivity prong.[12]

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[11]See *supra* note 9.

[12]In the magistrate judge's report and recommendation, he concluded that "there is evidence in the record indicating that other people have engaged in fraudulent absentee-ballot voting activities, including forging voters' signatures and altering ballots. What has not been shown is that these other individuals will never

Not only did Smith and Tyree fail to prove by clear evidence that there were similarly situated individuals who were not prosecuted and thereby failed to establish the discriminatory effect prong, they also failed to prove by clear evidence

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be prosecuted." We have previously disagreed with the magistrate judge's conclusion that the possibility of future prosecution is enough to rule out discriminatory effect. We also disagree with the report's apparent conclusion--if it is a conclusion--that the individuals Smith and Tyree point to were similarly situated with them. Our disagreement is not over any factfinding or credibility choice the magistrate judge made, but instead with the law which he applied to the facts.

As we have explained, in order to establish that others were similarly situated with them, Smith and Tyree had to prove by clear evidence that others committed the same crimes as they did, the same or a greater number of times, and that the evidence against those others was as strong or stronger than the evidence against Smith and Tyree. They failed to carry their burden. The magistrate judge applied the "similarly situated" test at too high a level of generality, assuming that anyone who committed any violation of federal law in connection with the same election is "similarly situated" with Smith and Tyree.

While we could remand the case to the district court for it or the magistrate judge to have another go at it, a remand would be pointless because our detailed review of the record convinces us that no facts could be found from the record evidence that would justify a conclusion Smith and Tyree had proved by clear evidence that others who were not prosecuted were similarly situated to them in the sense the applicable law requires. In addition, as we are about to explain, we agree with the magistrate judge that Smith and Tyree failed to establish discriminatory motive or purpose, which is an independently adequate basis for denial of their motion.

discriminatory intent and thereby failed to establish the second prong, too. Smith and Tyree argue that they established the discriminatory intent in two ways. First, they argue that the decision to bring the case in federal court, instead of state court, was prompted by a desire to avoid a black jury, and second, they argue that the district court's rejection of the government explanation for its peremptory strike of one black veniremember evidenced discriminatory intent behind the prosecution.

The first contention is not supported by even a shred of evidence in the record. It rests instead on an assumption that black defendants will not be treated in a just manner in federal court, an assumption which we reject. In regard to the second contention, at trial the government gave a race neutral reason for exercising the questioned peremptory strike, explaining that the prospective juror was not paying attention, that he was dozing off, and that he had his eyes closed during the voir dire questioning. The court rejected that strike because its "impressions of [the prospective juror] were not consistent with those recited by" the government. The only thing the court's rejection of the government's strike reveals is that the court did not agree with the government's observations. Rejection of one peremptory strike is no basis for concluding that the underlying prosecution is motivated by bias.

Having failed to prove by clear evidence either prong of a selective prosecution claim, Smith and Tyree were not entitled to have their motion to dismiss granted.

B. WHETHER THERE WAS SUFFICIENT EVIDENCE TO CONVICT TYREE ON COUNTS 12 AND 13

Counts 12 and 13 of the indictment charge Tyree with violating 42 U.S.C. § 1973i(c) by giving false information on an application for absentee ballot and on an affidavit of

absentee voter, respectively, concerning the name and address of Shelton Braggs. Tyree contends that those two counts required the government to prove beyond a reasonable doubt that Braggs neither filed the application or affidavit himself nor consented to their being filed by Tyree on his behalf. There was insufficient evidence to convict her on those counts, she says, because there was no evidence in the record that Braggs' application and affidavit were not filed at his direction.[13]

Neither Count 12 nor Count 13 charges that the relevant document was filed without Braggs' permission, and nothing in § 1973i(c) requires that the information be given without the voter's permission. Accordingly, when instructing the jury on the individual counts, the district court properly did not include "without the voter's permission" as a necessary element of the offenses charged in Counts 12 and 13. Tyree's arguments to the contrary are meritless.

However, the falsity of the information on the application or affidavit is an element of § 1973i(c), and there was insufficient evidence to prove beyond a reasonable doubt that the information was false with respect to the application which is the subject of Count 12. The government's handwriting expert

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[13]After trial but before sentencing, Braggs gave a sworn statement to defense counsel that was taken down by a court reporter. In it Braggs said: that he lived in Maryland at the time of the statement; that at the time of the election in November 1994 he considered 113 O'Neal Street in Eutaw, Greene County, Alabama, to be his permanent home; and that he did not personally cast an absentee ballot in that general election, but he gave Tyree permission to cast an absentee ballot for him provided that she voted the ballot for Smith. Because the issue raised before us is the sufficiency of the evidence to support the jury's verdict, we consider only the evidence that was before the jury.

testified that Tyree filled in some of the administrative information, including the addresses, on the application for absentee voter, but he was unable to say that Tyree had signed the application. The expert did not have a sample of Braggs' handwriting and could not rule out Braggs having signed the application. There was no evidence at trial that anyone other than Braggs had signed his name to the application.

The absentee election manager, Johnnie Knott, testified that the application referred to in Count 12 listed voter Braggs' residence address as 113 O'Neal Street and it listed the "mail ballot to" address as 507 Greensboro Street. There was no evidence that those addresses were not valid addresses for Braggs. In fact, there was testimony that those were good addresses for Braggs.[14] The evidence is consistent with Braggs signing the application that Tyree lawfully helped him fill out. Accordingly, we conclude that there is insufficient evidence to support a finding that any of the information Tyree wrote onto the application that is the subject of Count 12 was false, and her conviction on that count must be reversed.

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[14]Cora Stewart testified at trial that Braggs used to live on O'Neal Street but he had moved. She said that she did not know where he moved to or how long he has been away from Greene County because he is "in and out." She also said she thought the last time she saw Braggs in Eutaw (in Greene County) was "last year" and he was "at home on O'Neal Street" where his mother lives.

Josephine Lewis testified that Braggs was Tyree's boyfriend in 1994 and Hattie Edwards testified that Braggs lived with Tyree in 1994. The prosecution says in its brief that Tyree lived at 507 Greensboro Street, but the government does not cite any part of the record that actually backs up its statement, and we were unable to find any evidence to that effect.

The sufficiency of the evidence supporting Count 13, which charged Tyree with giving false information on Braggs' affidavit of absentee voter is a different matter. The government handwriting expert testified that Tyree signed Braggs' affidavit. Under Alabama law, there is no such thing as proxy voting: A voter cannot legally authorize or direct another to vote his ballot in his place. See *Taylor v. Cox*, 710 So. 2d 406 (Ala.1998) (absentee voting ballot invalid where voter's name not signed by voter but by designated agent with permission). Consequently, to sign someone else's name, with or without permission, is to "give[ ] false information as to his name." 42 U.S.C. § 1973i(c). Regardless of whether the other information on the affidavit was truthful, Tyree still gave false information by signing Braggs' name, because she is not Braggs.

C. WHETHER SMITH AND TYREE WERE CONVICTED ON MULTIPLICITOUS COUNTS

"Multiplicity is the charging of a single offense in more than one count. When the government charges a defendant in multiplicitous counts, two vices may arise. First, the defendant may receive multiple sentences for the same offense. Second, a multiplicitous indictment may improperly prejudice a jury by suggesting that a defendant has committed several crimes--not one. To determine whether an indictment is multiplicitous, we first determine the allowable unit of prosecution." *United States v. Langford*, 946 F.2d 798, 802 (11th Cir.1991) (citations omitted).

Smith and Tyree contend that the allowable unit of prosecution with respect to § 1973i(c) should include all steps preparatory to casting a ballot, regardless of the number of pieces of false information supplied. That contention forms the basis for their argument that certain pairs of counts in the indictment were multiplicitous, because those counts charged false information on the application for absentee ballot of a

particular voter in one count and false information on the affidavit of absentee voter of the same voter in the other count.[15]

The application of absentee ballot and affidavit of absentee voter are different documents serving distinct purposes. A count charging the giving of false information on an application of absentee ballot requires different proof than a count charging the giving of false information on an affidavit of absentee voter. The counts in question charge different offenses that may properly be charged in separate counts. See *United States v. Davis*, 730 F.2d 669, 671-72 (11th Cir.1984); *United States v. Cluck*, 143 F.3d 174, 179 (5th Cir.1998).[16] There was no

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[15]Specifically, Smith was convicted on Counts 8 and 9, both of which concerned Cassandra Carter, and Counts 10 and 11, both of which concerned Willie Carter. Tyree was convicted on Counts 3 and 4, both of which concerned Hill, Counts 5 and 6, both of which concerned Gilmore, and Counts 12 and 13, both of which concerned Braggs.

[16]Our holding, which is largely based upon *United States v. Davis*, 730 F.2d 669 (11th Cir.1984), is not inconsistent with *United States v. Langford*, 946 F.2d 798 (11th Cir.1998). In *Langford*, the defendant was charged with securities fraud relating to false statements made in several different documents related to a single purchase of securities, in violation of 15 U.S.C. §§ 78j(b) and 78ff. See *id.* at 800. We said that "to avoid the vices of multiplicity in securities fraud cases, each count of the indictment must be based on a *separate* purchase or sale of securities and each count must specify a false statement of material fact--not a full-blown scheme to defraud--in connection with that purchase or sale." *Id.* at 804 (emphasis added). Because the indictment in that case did not allege that each document "contained a specific material misstatement" and was "in conjunction with separate purchase or sale transactions," we held that the indictment was

multiplicity error.

D. WHETHER THE DISTRICT COURT ERRED IN ADMITTING EVIDENCE OF ABSENTEE BALLOT AFFIDAVITS TYREE WITNESSED

The district court admitted into evidence a government exhibit consisting of approximately ninety-five affidavits of

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multiplicitous. See *id.* The Langford holding was, however, explicitly limited to securities fraud cases. See *id.*

The defendant in *Davis* was charged with making false statements to a federally insured bank in several different documents, in violation of 18 U.S.C. § 1014. See *Davis*, 730 F.2d at 671. The documents were designed to procure a single loan. See *id.* We held that different counts in an indictment were appropriate because different documents were involved and different proof was required as to each count. See *id.* at 672.

We find *Davis* to be more analogous to the situation at hand. There are dangers inherent in the nature of securities cases that were not present in *Davis* and are not present in the case before us today. With the purchase and sale of securities, a single document, such as a prospectus, is mailed to thousands of shareholders, which raises the specter of thousands of counts. There was no similar mass publication or distribution of the loan documents in *Davis* nor of the applications for absentee ballots and affidavits of absentee voters in this case. In any event, to the extent there is any inconsistency between *Davis* and *Langford*, we are compelled to follow the prior precedent, which is *Davis*. See *Walker v. Mortham*, 158 F.3d 1177, 1188 (11th Cir.1998) (discussing conflict between lines of precedent and "earliest case" rule).

absentee voter that had been witnessed by Tyree.[17] Smith and Tyree assert the district court erred by admitting those affidavits because there was no evidence of wrongdoing as to most of them. The district court thought the affidavits were directly relevant to the conspiracy count. Paragraph 15 of Count 1 of the indictment reads as follows:

> It was further a part of the conspiracy that the defendants and their co-conspirators in some instances where a voter's signature was obtained on the affidavit of absentee voter would at a later time cause the affidavit of absentee voter to be completed, including the witnessing of the voter's signature by persons who did not see the voter sign the affidavit, and would cause the absentee ballot to be submitted and voted.

At trial, Cora Stewart reviewed the affidavits comprising Exhibit 21 and identified which of the affidavits she and Tyree had witnessed where she did not see the voter sign his signature. The affidavits were relevant to the conspiracy charge, and the district court did not abuse its discretion in admitting them into evidence.

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[17]Smith and Tyree's initial brief argues it was error to admit evidence of approximately 160 ballots that Tyree had witnessed, but that brief does not identify the exhibit or exhibits it is talking about. The government's brief in response refers to Government Exhibit 21, which consisted of approximately 95 affidavits and was admitted into evidence, and to Government Exhibit 22, which consisted of approximately 75 affidavits and, according to the government, was not introduced into evidence. The only exhibit Smith and Tyree's reply brief specifically mentions in connection with this issue is Government Exhibit 21. Accordingly, we discuss only Government Exhibit 21 and the approximately 95 affidavits it involves.

E. WHETHER TYREE WAS DENIED HER RIGHT UNDER THE FIFTH AND SIXTH AMENDMENTS TO PRESENT WITNESSES IN HER DEFENSE

Tyree contends that she was denied her constitutional right to present witnesses in her defense when the district court refused to permit her to introduce at trial Burnette Hutton's testimony from the selective prosecution hearing.[18] At the selective prosecution hearing, the government asserted its belief that Hutton would be committing perjury if she testified in accordance with an earlier affidavit, and it asked the magistrate judge who was presiding over the hearing to advise Hutton of her Fifth Amendment rights and to appoint Hutton counsel. The magistrate judge informed Hutton of her Fifth Amendment right not to incriminate herself, and he offered to appoint counsel for her, but Hutton declined the offer and proceeded to testify. During the government's cross-examination, it asked Hutton to give handwriting samples. Smith and Tyree's counsel objected. In response, the magistrate judge again explained Hutton's Fifth Amendment rights to her, and this time he appointed an attorney to advise her. After meeting with that attorney, Hutton decided to exercise her Fifth Amendment right not to testify. The government asked to be allowed to continue its cross-examination, asserting that Hutton had waived her privilege not to testify by answering questions on direct examination. The magistrate judge refused to permit the government to continue questioning Hutton and excused her from the hearing.

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[18]The Fifth Amendment provides that no person shall be "deprived of life, liberty, or property, without due process of law," U.S. CONST. amend. V., and the Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI.

At trial, Hutton refused to testify, asserting her Fifth Amendment privilege. Tyree attempted to introduce Hutton's testimony from the selective prosecution hearing that when she had signed the affidavit of Sam Powell, who is her father, she had done so with his permission. The government objected to the admission of Hutton's testimony from the hearing, because it had been unable to fully cross-examine her when she gave that testimony. The district court excluded the testimony under Federal Rule of Evidence 804(b)(1), after agreeing with the government that it had not had a full opportunity to cross-examine Hutton.[19] After reviewing the relevant part of the record, we agree with that premise and with the conclusion.

F. WHETHER THE JURY INSTRUCTIONS WERE ERRONEOUS

Smith and Tyree argue that the district court's jury charge permitted the jury to convict them without finding, beyond a reasonable doubt, that the voters in whose names ballots were submitted did not consent to the ballots being cast. What we have already held about that not being a necessary element of

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[19] Rule 804(b)(1) reads as follows:

> (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, [may be admitted into evidence] if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

FED.R.EVID. 804(b)(1).

the § 1973i(c) offense applies as well to the § 1973i(e) offense.[20] See supra Part III.B. But Count 1 of the indictment, the conspiracy count, nonetheless did allege that one object of the conspiracy was to commit crimes by voting more than once "by applying for and casting fraudulent absentee ballots in the names of voters without the voters knowledge and consent," in violation of § 1973i(e). And Count 2 charged the defendants with voting more than once by voting the absentee ballots of seven named people, among others, "without the knowledge and consent of said voters," in violation of § 1973i(e). None of the other counts of the indictment alleged the lack of the voters' knowledge or consent.

We will assume for present purposes that because Counts 1 and 2 alleged that Smith and Tyree's actions were done without the knowledge and consent of the voters whose names

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[20]We realize that in *United States v. Hogue*, 812 F.2d 1568 (11th Cir.1987), we discussed an indictment for a violation of § 1973i(e) that contained the "without the knowledge and consent of that voter" language. However, nothing in our *Hogue* opinion says that lack of knowledge and consent of the voter is a necessary element of a § 1973i(e) violation. *Hogue* concerned the application of collateral estoppel in a criminal prosecution for endeavoring to obstruct justice, in violation of 18 U.S.C. § 1503. In an earlier prosecution of the same defendant for voting more than once in violation of 42 U.S.C. § 1973i(e), the jury had been instructed that "voting meant marking the ballot of some other voter where the voter had not made a candidate selection or changing the ballot to reflect a selection different from the voter's, all without the expressed or implied consent of the voter." *Id.* at 1576. But we did not hold in *Hogue* that last clause was an element of § 1973i(e), only that the jury in the earlier case did not necessarily have to find that the defendant's actions were taken without consent in order to find that the defendant was not guilty, and thus, collateral estoppel did not apply. See *id.* at 1582-83.

were used, the defendants were entitled to have the jury instructed that lack of knowledge and consent were required insofar as those two counts were concerned.[21] The court did instruct the jury to that effect, but Smith and Tyree contend that the court's instruction on Alabama law negated what it told the jury about lack of knowledge and consent.

In its instructions, the district court told the jury: "In order to convict a defendant of the federal offenses charged in this indictment, however, the government also must prove, beyond a reasonable doubt, that the defendant under consideration knowingly and willfully signed the Application for Absentee Ballot without the knowledge and consent of that voter...." The court then gave the instruction on Alabama law that the defendants challenge, stating that "there is no such thing in Alabama as proxy absentee voting" and that "no absentee voter can lawfully grant his or her proxy to another person, granting permission to that other person to cast a voter's absentee ballot for him or for her." That is clearly a correct statement of Alabama law. See *Taylor v. Cox*, 710 So. 2d 406 (Ala.1998). The district court then repeated its earlier instruction, this time with respect to the affidavit of absentee voter: "In order to convict a defendant of the federal criminal offenses charged in this indictment, however, the government also must prove, beyond a reasonable doubt, that the defendant under consideration knowingly and willfully signed the voter's name

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[21]This is just an assumption for present purposes. On a somewhat related point, we have held that the government is not required to prove surplus allegations in an indictment. See *United States v. England*, 480 F.2d 1266, 1269 (5th Cir.1973) ("The Government need not prove all facts charged in the indictment as long as it proves other facts charged in the indictment which do satisfy the essential elements of the crime."); *United States v. Trexler*, 474 F.2d 369, 371-72 (5th Cir.1973) (same).

on the affidavit envelope without the knowledge and consent of that voter...."

Next, the court instructed the jury on the individual counts. With respect to Count 2, the court specified that the defendant must have acted "without the consent, or conscious, voluntary, and understanding participation of that other voter." With respect to Count 1, the conspiracy count, the court used the phrase "without the voters' knowledge and consent" when describing § 1973i(e) as a substantive crime underlying the conspiracy. Viewing these instructions in their entirety, we hold that they sufficiently conveyed to the jury that it had to find a lack of consent by the voter, at least as to Counts 1 and 2 (where it was alleged in the indictment).

G. WHETHER THE DISTRICT COURT ERRED IN APPLYING THE SENTENCING GUIDELINES

1. The Base Offense Level

Smith and Tyree contend that the district court erred in sentencing them, beginning with the base offense level it used. The applicable section of the Sentencing Guidelines reads as follows:

> Section 2H2.1. Obstructing an Election or Registration
>
> (a) Base Offense Level (Apply the greatest):
>
> (1) 18, if the obstruction occurred by use of force or threat of force against person(s) or property; or
>
> (2) 12, if the obstruction occurred by forgery, fraud, theft, bribery, deceit, or other means, except as provided in (3) below; or

> (3) 6, if the defendant (A) solicited, demanded, accepted, or agreed to accept anything of value to vote, refrain from voting, vote for or against a particular candidate, or register to vote, (B) gave false information to establish eligibility to vote, or (C) voted more than once in a federal election.

U.S.S.G. § 2H2.1. Relying on the revised Presentence Investigation Reports, the district court found that the appropriate base offense level for Smith and Tyree was 12. Tyree and Smith argue, however, that the language of the Guidelines exactly tracks the statutes under which they were convicted and clearly provides that the particular forms of fraud or deceit of which they were convicted warrant a base level of 6.

We agree with the district court that the appropriate base offense level was 12, as provided by § 2H2.1(a)(2). The language of (a)(2) applies in a case where forgery, fraud, theft, bribery, deceit, or other means are used to effect the vote of another person, or the vote another person was entitled to cast. By contrast, the language of (a)(3) addresses an individual who acts unlawfully only with respect to his own vote--an individual who accepts payment to vote, gives false information to establish his own eligibility to vote, or votes more than once in his own name. The offenses for which Smith and Tyree were convicted involved the votes of other individuals, in particular, the forging of other voters' names on applications of absentee ballot and affidavits of absentee voter. The district court did not err in applying a base offense level of 12.

2. The Enhancement of Tyree's Offense Level for Abuse of a Position of Trust

The district court enhanced Tyree's offense level pursuant to § 3B1.3, which provides that:

> [i]f the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels.

U.S.S.G. § 3B1.3.

"The abuse of trust enhancement applies ... where the defendant has abused discretionary authority entrusted to the defendant by the victim...." *United States v. Jolly*, 102 F.3d 46, 48 (2d Cir.1996) (as quoted in *United States v. Garrison*, 133 F.3d 831, 839 (11th Cir.1998)). As we explained in *United States v. Garrison*, 133 F.3d at 837, and *United States v. Barakat*, 130 F.3d 1448, 1454 (11th Cir.1997), "the position of public or private trust must have contributed in some significant way to facilitating the commission or concealment of the offense." U.S.S.G. § 3B1.3 commentary at application note 1. The "offense" refers to the offense of conviction. See *Barakat*, 130 F.3d at 1455. "Significant facilitation" in committing the offense of conviction is present when "the person in the position of trust has an advantage in committing the crime because of that trust and uses that advantage in order to commit the crime." *Id.* at 1455.

Tyree points to the fact that Smith, who did not hold the position of deputy registrar, was convicted of the same offenses as she was. She argues that means her position could not have significantly facilitated the commission of any of her offenses. But the guideline does not require that the position be essential to a defendant's commission of the offense, only that the position have significantly facilitated this particular defendant's commission of it. The fact that another defendant committed the same offense without use or abuse of the defendant's position does not preclude the application of the § 3B1.3 enhancement.

The Presentence Investigation Report recommended application of this enhancement because Tyree's position as a deputy registrar significantly aided her in fraudulently registering Sam Powell "and others," and the district court applied the enhancement for that reason. Tyree was not charged with and convicted of giving, or aiding another to give, false information on a voter registration card. But Tyree was convicted of offenses involving Sam Powell's vote, offenses which were dependent upon his having been registered to vote, and she used her position as deputy registrar to bring that about (fraudulently). Given those facts, we cannot say that the district court erred in finding that Tyree's position significantly aided her commission of an offense for which she was convicted. We reject as specious Tyree's argument that her position as Greene County Deputy Registrar is not a position of public trust. See *United States v. Cole*, 41 F.3d 303, 311 (7th Cir.1994) ("The court did not err ... in finding that as a registrar of voters [the defendant] violated a position of public trust" within the meaning of § 3B1.3.). The district court did not err in applying this enhancement.

3. The Enhancement of Smith's Offense Level for Obstruction of Justice

Referring to Application Note 3 in the Commentary to the Sentencing Guidelines, the district court enhanced Smith's offense level pursuant to § 3C1.1, which provides that:

> If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

U.S.S.G. § 3C1.1. The district court explained that: "the evidence at trial presented or established, beyond a reasonable

doubt, that the Defendant Smith influenced Michael Hunter to give a false affidavit concerning material facts." Smith contends the district court erred by failing to make specific findings of fact regarding which material facts Hunter testified falsely about or how Smith was responsible for them.

While it might have been preferable for the district court to identify the material facts about which Hunter testified falsely and for which Smith was responsible, as we have said before, "in the context of the record ..., detailed findings were not necessary and would have been redundant." *United States v. Hubert*, 138 F.3d 912, 915 (11th Cir.1998); *accord United States v. Diaz*, 190 F.3d 1247, 1256 (11th Cir.1999) (general finding that encompasses all factual predicates of perjury is sufficient). The district court did indicate that its finding in this regard relied upon the evidence presented at trial, and the court expressly adopted the factual statements in the revised Presentence Investigation Report. The addendum to that report, which addressed Smith's objections to the obstruction of justice enhancement, discussed in detail Smith's actions that warranted the enhancement. Moreover, because Smith did not request more specific findings of fact by the district court, "it is too late now to complain in this court." *United States v. Gregg*, 179 F.3d 1312, 1317 (11th Cir.1999) (quoting *United States v. Geffrard*, 87 F.3d 448, 453 (11th Cir.1996)); *accord Hubert*, 138 F.3d at 915.

4. The Enhancement of Smith and Tyree's Offense Levels for Their Roles

The district court enhanced Smith and Tyree's offense levels by four levels pursuant to § 3B1.1(a), because it found that each of them was an "organizer or leader of criminal activity that involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a). Smith and Tyree contend that there was no evidence their criminal activity, as distinguished

from their First Amendment-protected political activity, was extensive, and also complain that the court failed to adequately identify the five participants who were involved in the criminal activity. However, the Presentence Investigation Reports identified the five participants in the criminal activity and their activities, and the district court expressly adopted the report's factual findings. The district court did not err by enhancing Smith and Tyree's sentences for their roles in the offense.

IV. CONCLUSION

For the foregoing reasons, we affirm Smith's convictions and sentence in all respects; we reverse Tyree's conviction on Count 12, affirm her convictions on all other counts, and remand her case for the limited purpose of modifying judgment of conviction and sentence accordingly.

Order of the District Court Affirming and Adopting the Magistrate Judge's Report and Recommendation

[Caption Omitted in Printing]

ORDER

The court has carefully considered the defendants' objections to the Magistrate Judge's Report and Recommendation entered July 30, 1997. Having reviewed the entire record developed in connection with the defendants' motion to dismiss filed February 24, 1997, and the court file, the report and recommendation of the magistrate judge entered July 30, 1997, is hereby AFFIRMED and ADOPTED by the court. It is, therefore, ORDERED, ADJUDGED and DECREED that defendants' motion to dismiss is DENIED, and the government's motion *in limine* filed on March 5, 1997[1] is GRANTED.

The trial of this case shall commence in the United States Courthouse located in Tuscaloosa, Alabama, at 9:30 a.m., on Monday, September 8, 1997.

DONE this 19th day of August, 1997.

C. Lynwood Smith, Jr.
United States District Judge

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[1]The pleading actually is entitled "Response to Motion to Dismiss Indictment and Motion in Limine." (Document # 14)

Report and Recommendation of the Magistrate Judge on the Issue of Selective Prosecution

[Caption Omitted in Printing]

Report and Recommendation

This cause is before the court on the defendants' Motion to Dismiss the indictment filed February 24, 1997, and the Government's Response and Motion *in Limine* filed March 5, 1997. Together, these motions deal with the same legal question, whether these defendants are entitled to an abatement of this prosecution on the ground that they are being selectively prosecuted in violation of the Equal Protection Clause of the Fourteenth Amendment. The defense motion seeks dismissal of the indictment on that ground, and the Government's motion in limine seeks to preclude the defendants from raising the selective prosecution issue at the jury trial.

On referral from the district judge, the undersigned magistrate judge conducted 4½ days of hearings on these motions, beginning June 27, 1997, and concluding on July 14-17, 1997. The parties were given until July 24, 1997, to file post-hearing briefs and, which both parties filed although the defendants' brief was delayed in the Huntsville Clerk's office. On the basis of the testimony, exhibits, evidence, and arguments and stipulations of counsel, the following findings of fact and conclusions of law are proposed for consideration by the court.

Findings of Fact

1. The populations of the Alabama counties of Greene, Hale, and Wilcox are predominantly African-American. In fact, Greene County has a 92% African-American population.

Greene County is located within the federal judicial district for the Northern District of Alabama, while Hale and Wilcox County are located in the federal judicial district for the Southern District of Alabama. In the State of Alabama judicial system, Hale and Wilcox County are located in the Fourth Judicial Circuit, comprised of Bibb, Hale, Perry, Dallas, and Wilcox Counties, while Greene County is 'part of the Seventeenth Judicial Circuit, comprised of Greene, Sumter, and Marengo Counties. The Alabama Circuit Judge presiding over the Seventeenth Judicial Circuit is the Honorable Eddie Hardaway, Jr., who is African-American. Judge Hardaway was first elected to his office in November, 1994 and sworn into office in January, 1995. The district attorney for that circuit is Barrown Lankster, who is African-American also. The circuit judges presiding over the Fourth Judicial Circuit are the Hon. Jack Meigs and Thomas R. Jones, both of whom are white. The district attorney for that judicial circuit is Roy L. Johnson, who also is white.

2. Prior to the late 1960s or early 1970s, African-Americans were effectively disenfranchised as voters in Greene County. Only with the passage of the Voting Rights Act of 1965 and voter registration efforts in the years following thereafter did African-American voters begin to go to the polls in significant numbers. Because of the history of violence and intimidation associated with efforts by African-Americans to exercise their vote, many African-Americans continued to be uncomfortable going to the polls to vote, and felt more comfortable voting an absentee ballot in the privacy of their homes. Due to the unique racial history of voting in Greene County and perhaps others, absentee voting became a widespread practice evidenced by a significantly higher rate of absentee voting in Greene County compared to counties with predominantly white populations. The rate of absentee voting continued to accelerate, however, into the 1990s. In the 1992 Greene County general election, approximately 700 absentee

ballots were cast. Two years later, in the 1994 Greene County general election, 1,429 absentee ballots were cast out of a total of approximately 3,800 votes cast. Thus, in the 1994 Greene County general election, absentee ballots comprised approximately 37% of all votes cast in Greene County. Of the 1,429 absentee ballots cast, fewer than 4.0 were cast by white voters.[1] After the initiation of the investigation in this case during 1995 and 1996, absentee voting dropped off drastically, with only about 200 being cast in the 1996 presidential election.

3. Although the testimony did not identify the race of every official in Greene County, it is clear that most of the county officials are African-American. Certainly, the Circuit Clerk, the Tax Assessor, the majority (if not all) of the county commission, the Probate Judge, the Circuit Court Judge, and the District Attorney in Greene County are all African-American.

4. The testimony identified a number of groups active in the political and civic affairs of Greene County. Among these are the Alabama New South Coalition, the Alabama Democratic Conference, the traditional Alabama Democratic Party, and the Citizens For an Better Greene County. Such organizations as the Alabama New South Coalition, the Alabama Democratic Conference, and the Democratic Party are actively involved in

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[1]This small number of absentee ballots may not be surprising. Greene County Tax Assessor John Kennard testified that African-Americans constitute 92% of the population of Greene County, and that only 32 to 37 white voters cast absentee ballots. if 37 absentee ballots were cast by white voters out of a total of 1,429, this constitutes a rate of 2.5%. Given that whites constitute only 8% of the population of Greene County, the fact that only 2.5% of the absentee ballots cast were by white voters may not be unusual.

politics, including endorsement of candidates and active campaigns. The Citizens For a Better Greene County is an incorporated, tax-exempt charitable organization not directly involved in politics. It is a biracial organization with about 600 members. Its Articles of Incorporation mandate that its board of directors be composed of a black man and woman and a white man and woman. Some of its founders and early organizers included William Johnson and Rosie Carpenter, both of whom are black. Its bylaws provide that any elected officeholder in Greene County may participate only as an associate member, who may not vote or hold office in the organization. The Citizens For a Better Greene County, as an organization, does not endorse candidates or campaign for candidates, although certainly members of the organization may do so. Citizens For a Better Greene County was organized for the purpose of creating a forum through which governmental and public issues affecting the citizens of Greene County could be discussed and examined. In that regard, it has sponsored candidate forums at which all involved in particular races have been invited to appear and speak.

5. Defendant Frank "Pinto" Smith was elected Greene County Commissioner from District 4 in the 1994 general election, defeating in the Democratic Primary the incumbent, James Carter. Smith defeated Robert Hines in the general election of November of 1994. Both Smith and Carter were then and are now members of the Alabama New South Coalition. No evidence was offered concerning Hines' membership in any organization.

6. Defendant Connie Tyree is an employee of the Greene County Commission and an active community organizer. She also is a member of the Alabama New South Coalition. During the 1994 general election, her signature appeared as a witness on 166 absentee ballots, more than any other person.

7. Little of the testimony focused on specific political races during the 1994 election. In one race for county commissioner, William L. Johnson defeated incumbent Commissioner William "Nate" Roberson in the Democratic Primary and again in a run-off following the primary, despite the fact that Roberson polled 94 absentee ballots to 54 for Johnson in the run-off. After being defeated in the Primary, Roberson then ran in the General Election on the Patriot Party ticket. In the November General Election, Roberson polled 182 absentee ballots to 65 for Johnson. Although Johnson had more votes than Roberson at the polls, the absentee ballots gave Roberson the victory. Johnson, who is African-American, is one of the founding members of the Citizens For a Better Greene County; Roberson was supported by the Alabama New South Coalition. Following the election, Roberson complained to an FBI agent involved in the voter fraud investigation that he knew of no wrongdoing by his campaign workers, but had heard of two alleged improprieties involving Johnson. First, he alleged that Dorothy Jones told him that Johnson and Greene County Tax Assessor John Kennard had approached her about stealing the absentee ballot of an elderly friend, Essie Morton. They allegedly promised to "take care of her" if she did so. Also, Roberson complained that he had heard that Johnson was carrying around the absentee ballot of Horace McAlpine, seeking to have someone forge the voter's signature. Both of these improprieties were investigated. Dorothy Jones denied being approached by Johnson or Kennard with regard to Essie Morton's absentee ballot, and it was determined that no ballot was cast in the name of Horace McAlpine. Both Johnson and Kennard deny the allegations.

8. The investigation of potential absentee voting abuses in Greene County that ultimately lead to the indictment in this case began even before the 1994 General Election. In September of 1994, Tax Assessor John Kennard telephoned FBI Special Agent Marshall Ridlehoover in Tuscaloosa, Alabama, to tell

him that he had noticed that a significant number of absentee ballots had been mailed to addresses that were not the voters' addresses. A similar call was placed to Assistant United States Attorney John Ott a few days later. Additionally, Greene County Circuit Judge Claude Neilson, who retired in January 1995, mailed to then Acting United States Attorney Walter Braswell a copy of a letter Judge Neilson had received from an inmate at the Greene County Jail indicating his familiarity with voter irregularities going on in the county. In order to open an active investigation into voter irregularities, the FBI required the concurrence of both the United States Attorney for the Northern District of Alabama and the Department of Justice in Washington. That concurrence and authorization to open the investigation was given in October of 1994. Almost immediately, the investigation was stalled when all absentee ballots in the State of Alabama were impounded in Mobile by the United States District Court for the Southern District of Alabama as a result of the election dispute in a race for the Chief Justice of the Alabama Supreme Court. Through much of 1995, the investigation was dormant. During that period of October 1994 to October 1995, the investigation passively received information that was volunteered, but it conducted no active investigation.

9. In September of 1995, Special Agent Ridlehoover was contacted by Jessie Seroyer, Jr. and Ed McFadden of the Alabama Attorney General's Office. Seroyer was the senior special investigative agent for the Attorney General's Office and McFadden was an attorney in the office. They inquired whether the FBI had an active investigation on-going into absentee voting in Greene County, and were informed that there was an investigation. Later, on October 16, 1995, Ridlehoover was contacted again by McFadden and Deputy Attorney General Christy Lee, requesting that the Attorney General's office be allowed to join the investigation. That request led to a meeting in early November 1995 between representatives of the

Alabama Attorney General's Office and the Office of the United States Attorney for the Northern District of Alabama. Also present during the meeting were representatives of the Federal Bureau of Investigation and the Alabama Bureau of Investigation. A decision was reached to conduct the investigation jointly and Assistant Attorney General Gregory Biggs was designated as a Special Assistant United States Attorney to assist with the Greene County investigation. Biggs had been with the Attorney General's Office only one month at the time.

10. In late November 1995, the Alabama Bureau of Investigation issued subpoenas to obtain possession of all absentee voting records in Greene County, including applications, absentee-voter affidavits, and ballots. The records were picked up by the FBI and transported to the Attorney General's Office in Montgomery.

11. At the Attorney General's Office in Montgomery, a significant 'amount of time was involved in inputting absentee voting information into a computer data base used to track the identity of the witnesses to the signatures of the voters on the absentee ballots. By using the data base, investigators were able to sort and collate the ballots according to the names of the witnesses on the ballots. This information revealed that particular persons may have signed a ballot as a witness anywhere from as few as one time to as many as 166 times. Defendant Tyree witnessed 166 ballots, more than any other person. Investigators confirmed that 1,896 absentee ballots had been applied for by voters,. of which 1,429 ballots were actually cast. The remaining 467 ballots were mailed to voters according to the instructions on their application, but, for whatever reason, were not voted and returned to the Circuit Clerk's office.

12. As part of the investigative process, agents matched absentee ballot applications with actual absentee ballots

subsequently cast. It became apparent that there were discrepancies between the purported signatures of the voters on the applications and the signatures of the same voters on the actual ballots cast. Also, it became apparent that a significant number of absentee ballots were mailed to the same addresses, one being the post office box for the executive committee for the Democratic Party in Greene County and the other a post office box for the Greene County Water Authority. Similarly, a significant number of absentee ballots for District 3 of Greene County were being mailed to a post office box in Eutaw, which is not in District 3 of the county.

13. By February of 1996, another meeting was held in the U.S. Attorney's Office in Birmingham to decide how to narrow the scope of the investigation. At that point, all 1,429 absentee ballots had been reviewed, and a decision was made to limit the investigation to only those ballots on which appeared any witness who had witnessed more than 15 absentee ballots. Applying this criteria to the ballots, approximately 800 ballots fit that category. Neither the race nor political affiliations of the voters or witnesses were revealed by the ballot documents. At that point, a plan was devised under which investigators from the FBI, ABI, and the Attorney General's Office would contact and interview all of the approximately 800 voters whose ballots fit the investigative criteria. A standard interview format was devised under which the voters were asked about applying for the ballot, obtaining the ballot, whether they were assisted in filling out the ballot or the absentee voter affidavit, and how the ballot was returned to voting officials. During late February and March of 1996, 13 agents took approximately 3 weeks to contact and interview most of the 800 voters, utilizing the standard interview format each time. The interviews were not conducted in a confrontational manner, because the voters were viewed as being victims and were so treated.

14. In December of 1995 and January of 1996, three churches with predominantly African-American congregations were burned in Greene County. As part of a nationwide church-burning investigation, an investigation into these three particular arsons began under the supervision of FBI Agent Larry Long. When the voting fraud investigation reached the point at which it was preparing to interview approximately 800 people in Greene County, a supervisory decision was made to add to the voter fraud interview format certain questions regarding church burnings. This decision was made to save manpower and resources, while at the time same giving agents an opportunity to contact as many as 800 people in Greene County to determine if any of them had information about the church burnings. The melding of these two investigations at this interview stage was entirely a cost-saving decision.

15. Once the approximately 800 voter interviews were completed, a decision was made to focus further investigative efforts only on those ballots the votes [*sic*] affirmatively stated that he or she did not cast the vote or did not sign the absentee voter affidavit. This narrowed the scope of the investigation to approximately 40 to 50 ballots where there was evidence that the vote cast was not the true choice of the voter. Based on these 40 or 50 ballots, federal grand jury subpoenas were issued to obtain the handwriting exemplars of those persons whose names appeared as witnessed on the ballots. These subpoenas were issued beginning in May of 1996. To date, approximately 35 to 40 handwriting exemplars have been obtained, although subpoenas have been issued to additional people from whom handwriting exemplars have not been obtained successfully.

16. The testimony of the defendants, handwriting expert, Larry Keith Nelson, established that a number of other people, aside from the defendants, may have been involved in obtaining

forged or fraudulent voter signatures on absentee ballots.[2] Mr. Nelson compared handwriting exemplars of ten people to all of the absentee ballots made available to him. Those ten people were Roosevelt Brown. Sam Powell, Jr., Anessia. K. Belton, Lenora McGee, Mary L. Scarbrough, Willie T. Webster, Rosie L. Carpenter, Lenora T. Burks, Mary F. Webster, and Mary A. Webster. On the basis of his comparison of these handwriting exemplars with the absentee ballot applications and affidavits, Mr. Nelson was able to express opinions of varying degrees of certainty that some voters' signatures may have been written by some of these people. For example, he was able to conclusively determine that Roosevelt Brown wrote the voters' signatures on the absentee ballots of Mater Burton, Bertha Goodson, Sherwood Goodson, and Avis Goodson. He concluded less

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[2]In expressing his opinions, Mr. Nelson stated that the certainty of his conclusions fell along a continuum ranging anywhere from positively excluding a person as being the author of a questioned signature to positively concluding that the persons was the author. on this "scale of conclusions," Mr. Nelson Used particular terms as terms of art to indicate the degree of certainty of his opinion. Whenever he suggested that there were "indications" that a particular person was the author of a signature, he meant simply that certain characteristics of the signature were consistent with the characteristics of the known handwriting of such person but that there were also characteristics that were inconsistent. Such a conclusion ranks only slightly more certain than an inconclusive opinion. Next, whenever Mr. Nelson said that a person "probably" was the author of a signature, this meant that the person "very likely" was the author of the signature. Similarly, the term "highly probable" meant that there was only a remote possibility that someone other than the subject of the handwriting analysis was the author of the questioned signature. Finally, a positive conclusion, synonymous with certainty, was indicated when Mr. Nelson simply stated that the known person "wrote" the questioned signature.

certainly that there were "indications" that Brown wrote the voters' signature on the absentee ballots of Ethel Colvin and Edward Lavender. He also concluded that it was "highly probable" that Roosevelt Brown wrote the signature on the absentee ballot of John I. Lavender. He concluded positively that Rosie Carpenter wrote the voter's signature on the absentee ballot of Robert Cook, and less certainly that there were "indications" that she wrote the voter's signature on the absentee ballot of Joe Wrencher. Furthermore, Mr. Nelson concluded that there were "indications" that the signature on the absentee ballot of Van Allen Green was written by Willie T. Webster, and that the signature on the ballot of Matthew Dixon "probably" was written by Mary A. Webster. Similarly, he concluded that there were "indications" that Mary L. Scarbrough wrote the signature on the absentee ballot of Christopher Hicks, and that there were "indications" that Mary F. Webster wrote the signature on the ballot of Joe Wilson Hill.

17. Although Mr. Nelson had no handwriting exemplars for several other people, he nonetheless concluded with varying degrees of certainty that other people were involved in signing the absentee ballots of several other voters. He was able to draw these conclusions based not upon formal handwriting exemplars but writing samples contained in other written materials supplied to him. Thus, he concluded that Felicia Johnson "probably" wrote the signature on the absentee ballot of Latasha Johnson; that Johnny Scott "probably" wrote the signature on the absentee ballot of Elizabeth Deloach; that it was "highly probable" that Esther Colvin wrote the signature on the absentee ballot of Peggy Colvin; and there were "indications" that Minnie Branch wrote the signature on the absentee ballot of Rufus Branch.[3]

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[3]There was no testimony offered to clarify whether any familial relationship exists between Minnie Branch and Rufus

18. In addition to the voter fraud investigation and prosecution in Greene County, conducted by the U.S. Attorney's Office for the Northern District of Alabama, agencies of the State of Alabama also have investigated and are prosecuting voter fraud cases in state court in Wilcox and Hale Counties. Assistant Attorney General Gregory Biggs has been the lead prosecutor for the Alabama Attorney General's Office in the prosecutions in Hale and Wilcox Counties, as well as the liaison with the U.S. Attorney's Office for the Northern District of Alabama in the Greene County investigation. The Hale County investigation was conducted entirely by the Alabama Bureau of Investigation, which then submitted its information to Assistant Attorney General Biggs for evaluation for prosecution. In Wilcox County, the Attorney General's office contracted with an investigator to carry out a voter fraud investigation in that county. A personality conflict arose between Sheriff Prince Arnold of Wilcox County and Assistant Attorney General Biggs that interfered with the investigation of voter fraud in that county. Although Sheriff Arnold had investigated possible voter fraud by two white people, he refused to share his investigative file with Biggs, proclaiming that he would hire his own prosecutor to handle the case. Biggs never refused to consider the case or to prosecute it, but was prevented from doing so because Sheriff Arnold refused to give him the investigative file to do so. Sheriff Arnold was angry

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Branch and Peggy Colvin and Esther Colvin, which might otherwise explain the signatures. Oddly, in investigative interviews that occurred on March 4, and March 8, 1996, Felicia. Johnson stated inconsistently that she signed her absentee ballot but did not vote, while her sister, Latasha Johnson, affirmatively acknowledged that she voted and signed her own absentee ballot, which was witnessed by her sister, Felicia. See Defendant's Exhibits 33 and 34.

with Biggs because Biggs had earlier dismissed disorderly conduct charges against two white poll watchers arrested by the Sheriff. Biggs investigated the allegations against the poll watchers and determined that there was not sufficient evidence to merit prosecution. He then exercised legitimate prosecutorial discretion to dismiss the cases. This angered Sheriff Arnold and prompted him to refuse to cooperate with other investigations by Biggs and the Attorney General's office.

19. Hale and Wilcox Counties are located within the federal judicial district for the Southern District of Alabama. On several occasions, the Attorney General's Office has requested the assistance of the U.S. Attorney for the Southern District of Alabama in carrying out voter fraud investigations in those and other counties. To date, no assistance has been forthcoming. See Government's Exhibit 2.

20. October 26, 1994, sisters Rosie Carpenter and Annie Thomas both were arrested by Sheriff George Hall of Greene County on the basis of complaints signed, respectively, by Ronetta Hicks and Dorothy Lee, accusing Ms. Carpenter and Ms. Thomas of attempting to influence or bribe them as voters. Both Ms. Thomas and Ms. Carpenter are African-American females in their seventies. On November 18, 1994, the District Attorney of Greene County, Barrown D. Lankster, who also is African-American, moved to nolle pros both cases. Those motions were granted by the Greene County District Judge, who also is black, on November 29, 1994, resulting in the dismissal of the charges against Ms. Thomas and Ms. Carpenter.

21. The investigation of absentee-voting irregularities in Greene County continues even today, with FBI and Attorney General investigators traveling to Greene County on a weekly, if not daily, basis. Decisions concerning the direction of the investigation and prosecution are being made by the United

States Attorney's Office for the Northern District, and Assistant Attorney General Biggs merely assists, not controls, the United States Attorney.

Conclusions of Law

The decision concerning whom to prosecute and what charges to file are core functions of the Executive Branch of government, which carry a strong presumption of regularity. United States v. Armstrong, 517 U.S. ___, ___ 116 S.Ct. 1480, 134 L. Ed. 2d 687, 698 (1996); Wayte v. United States, 470 U.S. 598, 607, 105 S.Ct. 1524, 84 L. Ed. 2d 547 (1985). Courts are naturally reluctant to inquire into the prosecutive decision-making process, not only because it transgresses the separate functions performed by the Executive Branch, but also because it exacts costs in the criminal process, such as delaying prosecutions and disclosing prosecution strategy. Balanced against the very broad discretion vested in prosecutors is the constitutional constraint that they not selectively prosecute people for constitutionally impermissible reasons such as racial or religious discrimination or to chill the exercise of fundamental rights. The balance between these competing interests is struck on the burden of proof required of a defendant to overcome the presumption of regularity. Only upon a showing by clear and convincing evidence that a defendant has been subjected to an unconstitutionally-motivated selective prosecution is the presumption dispelled. See United States v. Armstrong, supra; Wayte v. United States, supra. "[I]n the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties." United States v. Armstrong, supra at ___ (quoting United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15, 47 S.Ct. 1, 71 L. Ed. 131 (1926)). The burden of proof is intended to be "a demanding one, in order to assure that only truly meritorious claims warrant the costs entailed in pursuing them. United States v. Armstrong, supra.

The essential elements of a selective-prosecution claim are drawn from equal-protection analysis.

> The requirements for a selective-prosecution claim draw on "ordinary equal protection standards." [Citation omitted]. The claimant must demonstrate that the federal prosecutorial policy "had a discriminatory effect and that it was motivated by a discriminatory purpose." [Citations omitted].

United States v. Armstrong, supra, at ___, 134 L, Ed. 2d at 699 (quoting and citing Wayte v. United States, 470 U.S. 598, 608, 105 S.Ct. 1524, 84 L. Ed. 2d 547 (1985) and Oyler v. Boles, 398 U.S. 448, 456, 82 S.Ct. 501, 7 L. Ed. 2d 446 (1962)). Thus, the two elements of selective prosecution that must be proven by clear and convincing evidence are first, that the defendant was selected for prosecution when other similarly situated individuals were not prosecuted, and second, that the selection of the defendant for prosecution was motivated by an unconstitutional desire to discriminate on the basis of race or some other impermissible standard. These elements can be referred to as the "selectivity" prong and the "motivation" prong. It must be emphasized that both prongs must be proved by clear and convincing evidence to establish selective prosecution sufficient to dispel the presumption of regularity that attaches to prosecutorial decisions.

A conceptual understanding of the selectivity prong is not difficult. Here, the defendant is required to show by clear and convincing evidence that a prosecutorial decision was made to prosecute him or her and not to prosecute other persons similarly situated to the defendant. It is not enough to show simply that the defendant has been prosecuted and that some other person like him has not yet been prosecuted. The limits of human resources and ability necessarily mean that not all similarly-situated defendants can be simultaneously prosecuted;

some are prosecuted presently, and others will be prosecuted in the future. Rather, to establish the selectivity prong, the defendant must show an affirmative decision by prosecutors to charge the defendant and an affirmative decision by the prosecutors not to charge other, similarly-situated individuals. Only by showing that the prosecution has decided both to prosecute the defendant and not to prosecute others can it be said that the prosecutors have "selected" the defendant. Proof of something less than that "selection" proves only the obvious – that the defendant is being prosecuted at the present time and that there are other people who may yet be prosecuted in the future. To overcome the presumption that prosecutors are acting in good faith, a defendant must prove that there is no basis for believing that they are, indeed, acting in good faith, and he can do this only by showing that prosecutors have "selected" him for prosecution, ignoring similar wrongdoing by others.

The "motivation" prong of a selective-prosecution claim requires proof by clear and convincing evidence that the "selection" decision made by the prosecutor was impermissibly motivated by a desire to discriminate against the defendant on an invidious basis or on the basis of the defendant's exercise of fundamental constitutional rights.[4] As with all equal protection

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[4]While the Armstrong case involved a claim of racial discrimination in selective prosecution, the older case of Wayte v. United States was grounded upon a claim that a defendant was selectively prosecuted because he had exercised his fundamental First Amendment right to freedom of speech. Various circuits around the country have held that political affiliation, like speech, is one of the fundamental constitutional rights protected by the First Amendment which cannot be a factor motivating a decision to prosecute a particular defendant. See United States v. Torquato, 798 F.2d 271 (7th Cir. 1986) ("Membership in a political party is protected by the First Amendment, and the mere

questions, however, the proof must establish that the defendant was selected because of his race or political affiliation.

> "Discriminatory purpose" ... implies more than... intent as awareness of consequences. It implies that the decision-maker... selected or reaffirmed a particular course of action at least in part "because of" not merely "in spite of," its adverse effects upon an identifiable group.

Wayte v. United States, 470 U.S. 598, 610, 105 S.Ct. 1524, 84 L. Ed. 2d .541f 557-558 (1985) (quoting Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L. Ed. 2d 870 (1979)). Thus, to prevail on a selective prosecution claim, there must be clear and convincing evidence that the defendant was selected for prosecution "because of" his or her race or political affiliation, not merely "in spite of" them. It is not enough merely to correlate the selection with the defendant's race or political associations. It

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exercise of that right cannot be punished by means of selective prosecution."); United States v. Falk, 479 F.2d 616 (7th Cir. 1973) ("[J]ust as discrimination on the basis of religion or race is forbidden by the Constitution, so is discrimination on the basis of the exercise of protected First Amendment activities, whether done as an individual or, as in this case, as a member of a group unpopular with the government."); United States v. Cyprian, 23 F.3d 1189 (7th Cir. 1994)("Selective prosecution is grounds for acquittal only if the basis of selection is a forbidden ground, such as race, religion or political opinion."); see also Lennon v. Immigration and Naturalization Service, 527 F.2d 187 (2nd Cir. 1975); Adame-Hernandez v. Immigration and Naturalization Service, 769 F.2d 1387 (9th Cir. 1985); United States v. Pottorf, 769 F. Supp. 1176 (D. Kan. 1991); United States v. Carson, 434 F. Supp. 806 (D. Conn. 1977); United States v. Mavroules, 819 F. Supp. 1109 (D. Mass. 1993).

must be the race or political association that is the target of the selection decision; the defendant is selected because of his race or affiliation.

Carefully considering the evidence presented in light of this "demanding" standard, the court believes that the defendants have failed to establish either that they were selected for prosecution or that the prosecution was motivated by an invidiously-discriminatory intent. First, on the selectivity prong, the defendants have not proven that they have been singled out for prosecution and that an affirmative decision has been made not to prosecute other similarly situated individuals. It is certainly true that there is evidence in the record indicating that other people have engaged in fraudulent absentee-ballot voting activities, including forging voters, signatures and altering ballots. What has not been shown is that these other individuals will never be prosecuted.

The Government has staunchly maintained throughout that the investigation of fraudulent absentee-voting activities in Greene County is on-going and that these defendants are but the first in a series of people yet to be indicted and prosecuted. It is not uncommon, and certainly is legitimate, for a prosecuting authority to allocate its limited resources by investigating and prosecuting defendants serially rather than simultaneously, building stronger prosecutions over time. The presumption of regularity mandates that the court presume that the prosecutors are acting on the basis of this legitimate motive absent some "clear evidence" to the contrary. The defendants have offered no "clear evidence" that it is untrue that more prosecutions are to come. What today may seem like defendants being singled out for prosecution may later, in the fullness of time, be nothing more than the first of many prosecutions. Because of the presumption of regularity, it is the burden of the defendants to show that, in fact, no other prosecutions are planned and that they alone have been singled out for prosecution. This they have

not done. There simply is no evidence before the court to justify a conclusion that no other prosecutions are planned by the Government. To the contrary, the testimony of the case agent, special Agent Marshall Ridlehoover, confirms that the investigation is continuing actively even today. Consequently, the defendants have failed to carry their burden of proving selectivity.

Similarly, the defendants have failed to carry their burden of proving a discriminatory or other constitutionally-impermissible motive for the prosecution. A great deal of evidence focused on the possibly illegal activities of people viewed by the defendants as their political opponents. The defendants argued generally that a number of people associated with the Citizens For a Better Greene County have also engaged in the same types of voter-fraud activities alleged in the indictment against the defendants. At the outset, it seems clear that, even if this is true, race was not a motivating factor. All of the other people identified by the defendants are themselves African-American, like the defendants. While not impossible, it is highly unlikely that these defendants would be singled out for prosecution "because of" their race, when others of the same race were not prosecuted for similar activities. If race motivated the prosecution against these defendants, it would also motivate the prosecution of others. Thus, there is no clear and convincing evidence that the race of these defendants was a factor in the prosecutive decision to charge them.

Neither does the evidence prove clearly and convincingly that these defendants were prosecuted "because of" their political affiliation. The defendants' argument advances more by negative implication. They argue in substance that they are members of the Alabama New South Coalition and that others not prosecuted for activities similar to those for which they are charged are members of a rival political organization, the Citizens For a Better Greene County, which, they say, the

Government favors. But the evidence is not nearly so strong. While it does point to some people who are members of Citizens For a Better Greene County, it also points to others who are apparently not members of either organization.[5] The evidence simply does not establish any pattern that the Government chose not to prosecute people because of their membership in Citizens For a Better Greene County or chose to prosecute people because of their membership in the Alabama New South Coalition. Hence, the defendants failed to carry their burden of showing clear and convincing evidence that the decision made by the United States Attorney's Office to prosecute these two defendants was motivated in part by a desire to punish them either for their membership in the Alabama New South Coalition or due to their opposition to Citizens For a Better Greene County.

Conclusion

In summary, the court concludes that the defense motion to dismiss the indictment on the ground Of selective prosecution is due to be denied. The demanding standard of showing clear and convincing evidence to dispel the presumption of regularity that attached to prosecutorial decisions has not been met. It follows., therefore, that the Government's motion in limine to preclude the defendants from asserting the selective-prosecution

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[5]For example, there is evidence of potentially illegal activity by Rosie Carpenter, who clearly is a member of and associated with Citizens For a Better Greene County. On the other hand, there is evidence of possible illegal activity by such people Esther Colvin, Johnny Scott, Minnie Branch, and Roosevelt Brown, none of whom were clearly linked to Citizens For a Better Greene County. The defendants also advanced a number of unsubstantiated allegations against several people who expressly denied any association with Citizens For a Better Greene County.

claim as a defense during the jury trial is due to be granted. As the Supreme Court made clear in United States v. Armstrong, selective prosecution "is not a defense to the merits of the criminal charge," but a bar in abatement of the entire prosecution if it is established. Because the evidence here does not establish selective prosecution, the continued prosecution of these defendants is not barred, and any discussion of selective prosecution during the jury trial would be irrelevant and prejudicial to the merits of the charges.

Recommendation

Based upon the foregoing findings of fact and conclusions of law, the magistrate judge RECOMMENDS that the motion to dismiss on selective prosecution grounds filed by the defendants on February 24, 1997, be DENIED, and that the Government's motion in limine filed on March 5, 1997, be GRANTED.

Any party may file specific written objections to this report and recommendation within fifteen (15) days from the date it is filed in the office of the Clerk. Failure to file written objections to the proposed findings and recommendations contained in this report and recommendation within fifteen (15) days from the date it is filed shall bar an aggrieved party from attacking the factual findings on appeal.

The Clerk is DIRECTED to send a copy of this report and recommendation to all counsel of record in this action.

DATED this 29th day of July, 1997.

_____

T. MICHAEL PUTNAM
CHIEF MAGISTRATE JUDGE

Constitutional and Statutory Provisions Involved

The Due Process Clause of the Fifth Amendment:

> ... nor shall any person ... deprived of life, liberty, or property, without due process of law

U.S. CONST. Amend. V.

The Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defense.

U.S. CONST. Amend. VI.

The Equal Protection Clause of the Fourteenth Amendment:

> .... nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. Amend. XIV, § 1.

The Voting Rights Act of 1965, §§ 11(c) and (e), 42 U.S.C. § 1973i(c) and (e)

(c) False information in registering or voting; penalties

Whoever knowingly or willfully gives false information as to his name, address, or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years, or both: Provided, however, That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

* * *

(e) Voting more than once

(1) Whoever votes more than once in an election referred to in paragraph (2) shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) The prohibition of this subsection applies with respect to any general, special, or primary election held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of

Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(3) As used in this subsection, the term "votes more than once" does not include the casting of an additional ballot if all prior ballots of that voter were invalidated, nor does it include the voting in two jurisdictions under section 1973aa-1 of this title, to the extent two ballots are not cast for an election to the same candidacy or office.

United States Sentencing Guidelines:

Section 2H2.1. Obstructing an Election or Registration

(a) Base Offense Level (Apply the greatest):

(1) 18, if the obstruction occurred by use of force or threat of force against person(s) or property; or

(2) 12, if the obstruction occurred by forgery, fraud, theft, bribery, deceit, or other means, except as provided in (3) below; or

(3) 6, if the defendant (A) solicited, demanded, accepted, or agreed to accept anything of value to vote, refrain from voting, vote for or against a particular candidate, or register to vote, (B) gave false information to establish eligibility to vote, or (C) voted more than once in a federal election.

U.S.S.G. § 2H2.1.

Supreme Court, U.S.
FILED
APR 5 2001

(2)

No. 00-1192

In the Supreme Court of the United States

FRANK SMITH AND CONNIE TYREE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in affirming the district court's denial of petitioners' motion to dismiss for selective prosecution.

2. Whether the court of appeals erred in affirming the district court's instructions on 42 U.S.C. 1973i(c) and (e), which did not treat lack of voter consent or knowledge as an element of those offenses.

3. Whether the court of appeals erred in affirming the district court's decision to assign petitioners a base offense level of 12 pursuant to United States Sentencing Guidelines § 2H2.1(a)(2).

4. Whether the court of appeals erred in affirming the district court's decision to exclude the prior testimony of a defense witness pursuant to Federal Rule of Evidence 804(b)(1).

5. Whether the court of appeals erred in affirming the district court's decision to admit certain evidence consisting of absentee ballot affidavits.

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In the Supreme Court of the United States

No. 00-1192

FRANK SMITH AND CONNIE TYREE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-38) is reported at 231 F.3d 800.

JURISDICTION

The judgment of the court of appeals was entered on October 25, 2000. The petition for a writ of certiorari was filed on January 22, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioners were convicted on one count of conspiracy to vote more than once and to give false information to establish voters' eligibility to vote, in violation of 18 U.S.C. 371 (Count 1), and one

count of voting more than once in a federal election, in violation of 42 U.S.C. 1973i(e) (Count 2). Petitioner Smith was also convicted on two counts of giving false information on applications for absentee ballots, in violation of 42 U.S.C. 1973i(c) (Counts 8 and 10), and three counts of giving false information on affidavits of absentee voters, in violation of 42 U.S.C. 1973i(c) (Counts 6, 9, and 11). Petitioner Tyree was also convicted on three counts of giving false information on applications for absentee ballots, in violation of 42 U.S.C. 1973i(c) (Counts 3, 5, and 12), and six counts of giving false information on affidavits of absentee voters, in violation of 42 U.S.C. 1973i(c) (Counts 4, 6, 7, 9, 11, and 13). Petitioners were sentenced to concurrent terms of 33 months' imprisonment, to be followed by two years' supervised release. Pet. App. 6. The court of appeals affirmed on all but one count. *Id.* at 38.[1]

1. This case stems from absentee voting abuses that were committed during the November 8, 1994, general election in Greene County, Alabama. The general election included candidates for the office of the United States House of Representatives—triggering federal voting laws—as well as candidates for various state and local offices. Smith was a candidate in the November 8, 1994, general election for Greene County Commissioner. Tyree was Greene County Deputy Registrar during the election period; she worked with the Greene County Commission and supported Smith's candidacy for commissioner. Gov't C.A. Br. 6; Pet. App. 36.

On the evening before the November 8, 1994, general election, Tyree picked up Cora Stewart and brought

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[1] The court reversed Tyree's Section 1973i(c) conviction on Count 12 for insufficient evidence. Pet. App. 22-24.

her to an activity center to witness absentee ballots. Stewart saw Smith at the activity center and noticed that Smith had a lot of absentee ballots with him in a black briefcase. Smith told Stewart to help Tyree sign absentee ballots. Stewart and Tyree signed as witnesses to numerous absentee ballot affidavits. No voters were present that night and Stewart did not see any voter sign the affidavits. Stewart signed as a witness to approximately 95 affidavits of absentee voter; Tyree's signature appeared as a witness on 166 absentee ballots, more often than any other person's signature. More than 1400 absentee ballots were cast in the November 8, 1994, general election, and approximately 1000 of those ballots were contained in envelopes postmarked November 8, 1994, and received by the circuit clerk of Greene County after 5 p.m. that day. Gov't C.A. Br. 6-8, 20-22; Pet. App. 43.

The evidence further showed that Smith and Tyree committed the following acts, in violation of 42 U.S.C. 1973i(c) and 42 U.S.C. 1973i(e)[2]:

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[2] Section 1973i(c) provides that

> Whoever knowingly or willfully gives false information as to his name, address or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years, or both: *Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District

- Tyree filled out an application for absentee ballot dated November 1, 1994, in the name of Angela Hill, and provided false information about Hill's date of birth. Tyree completed an affidavit for absentee voter postmarked November 8, 1994, forged Hill's signature on the affidavit, and provided faise information about Hill's date of birth and address. Hill did not apply for an absentee ballot, did not vote by absentee ballot, and did not give Tyree permission to cast a vote on her behalf. Gov't C.A. Br. 9-10.

- Tyree filled out an application for absentee ballot dated October 28, 1994, in the name of Eddie Gilmore, providing a false address. Tyree forged Gilmore's signature on an affidavit for absentee voter, and Smith provided false information about Gilmore's address on the affidavit. Gilmore, who had never voted, did not permit anyone to complete the application for absentee ballot and did not know that an application for absentee ballot or affidavit of absentee voter was sent in his name. Gov't C.A. Br. 11.

- Tyree completed many portions of Sam Powell's Alabama Voter Registration Application, in-

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of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

42 U.S.C. 1973i(c).

Section 1973i(e) provides in relevant part that

(1) Whoever votes more than once in an election referred to in paragraph (2) shall be fined not more than $10,000 or imprisoned not more than five years, or both.

42 U.S.C. 1973i(e). Paragraph (2) of Section 1973i(e) contains the same jurisdictional restriction as Section 1973i(c).

cluding his name, address, place of birth, and date of birth. Tyree signed the application as deputy registrar. Tyree also forged his signature on an application for absentee ballot filed with the circuit clerk on April 28, 1994. Tyree provided a false address for Powell on an affidavit for absentee ballot postmarked November 8, 1994, and falsely attested on the affidavit to witnessing the execution of his oath. Powell, who has never voted in his life, did not give Tyree permission to register him to vote and was not involved in filling out the registration application, nor did he apply for an absentee ballot or fill out an affidavit of absentee voter. Gov't C.A. Br. 12-13.

- Tyree provided a false return address on Cassandra Carter's absentee ballot affidavit and falsely attested to witnessing the execution of her oath. Smith provided a false address on Cassandra Carter's ballot affidavit and forged her name on the ballot application dated October 26, 1994, which he filled out. Cassandra Carter has never voted by absentee ballot, and she gave no one permission to do so on her behalf. Gov't C.A. Br. 16-17.

- Tyree provided a false return address on Willie C. Carter Jr.'s absentee ballot affidavit postmarked November 8, 1994, and falsely attested to witnessing the execution of his oath. Smith provided a false address on Willie Carter's ballot affidavit, and filled out Willie Carter's ballot application dated October 26, 1994, forging his signature. Willie Carter has never voted by ab-

sentee ballot and never gave anyone permission to apply for one or cast one in his name. Gov't C.A. Br. 17-18.

- Tyree signed Shelton Braggs' name on Braggs' absentee ballot affidavit. Gov't C.A. Br. 19; Pet. App. 25.

2. On January 30, 1997, petitioners were charged in a thirteen-count indictment with violations of federal voting laws. Petitioners moved to dismiss the indictment on the ground that they were being selectively prosecuted on the basis of their race and political affiliation. (Petitioners are black and are members of a political faction called the Alabama New South Coalition. Pet. App. 42-43 (paras. 4-6)). The government opposed that motion and argued that petitioners failed to show that they were entitled to discovery on that claim under the threshold standard established by *United States* v. *Armstrong*, 517 U.S. 456, 470 (1996) (to obtain discovery on a race-based selective prosecution claim, defendant must make "credible showing of different treatment of similarly situated persons" of other races). On June 3, 1997, the magistrate judge ruled that petitioners satisfied that standard and ordered the government to make available to petitioners its memoranda of interviews (known as "FBI 302s") and certain other evidence pertaining to the investigation. The district court affirmed the magistrate judge's discovery order. Gov't C.A. Br. 2-4.

A selective prosecution hearing began on June 27, 1997, and lasted four and a half days. Several witnesses testified. Petitioners presented the testimony of Burnette Hutton, Sam Powell's daughter, who had submitted an affidavit that was attached to petitioners' motion to dismiss. Gov't C.A. Br. 45. Based on

information gathered during its investigation, the government believed that Hutton's affidavit contained false statements. *Id.* at 46. As a result, the government informed the magistrate judge of its belief that Hutton would be committing perjury if her testimony paralleled her affidavit. R. 11-288 to 11-289.

The magistrate judge informed Hutton of her Fifth Amendment privilege against self-incrimination and offered to appoint her an attorney. Hutton responded that she understood her rights and did not need a lawyer, then proceeded to testify. R. 11-291. When the government asked her to provide handwriting samples on cross-examination, however, petitioners' counsel objected, and the magistrate judge appointed an attorney to advise Hutton. After meeting with the attorney, Hutton elected not to testify further. The government sought to continue the cross-examination on the ground that Hutton had waived her Fifth Amendment privilege as to matters addressed in the affidavit, but the magistrate judge disagreed and excused Hutton. Gov't C.A. Br. 47-48; Pet. App. 29.

3. On July 29, 1997, the magistrate judge issued an order recommending that petitioners' motion to dismiss be denied. After "[c]arefully considering the evidence," the magistrate judge ruled that petitioners "failed to establish either that they were selected for prosecution or that the prosecution was motivated by an invidiously-discriminatory intent." Pet. App. 57.

The magistrate judge found that evidence of discriminatory effect was wanting, because, while there was evidence "indicating that other people have engaged in fraudulent absentee-ballot voting activities," Pet. App. 57, petitioners did not show that such individuals would never be prosecuted. As for discriminatory intent, the magistrate judge found that it was

clear that "race was not a motivating factor," in light of the fact that "[a]ll of the other people identified by the [petitioners] are themselves African-American, like [petitioners]." *Id.* at 58. The magistrate judge also found that the evidence failed to show that the prosecution was motivated by petitioners' political affiliation, explaining that "[t]he evidence simply does not establish any pattern that the Government chose * * * to prosecute people because of their membership in the Alabama New South Coalition." *Id.* at 59. The district court adopted the magistrate judge's order denying petitioners' motion to dismiss. *Id.* at 39.

4. Trial took place between September 8, 1997, and September 17, 1997. During the trial, petitioners objected to the admission of a government exhibit consisting of approximately 95 absentee voter affidavits witnessed by Tyree. The district court admitted the exhibit, finding the affidavits relevant to the conspiracy count, which alleged in part that

> [i]t was further a part of the conspiracy that the defendants and their co-conspirators in some instances where a voter's signature was obtained on the affidavit of absentee voter would at a later time cause the affidavit of absentee voter to be completed, including the witnessing of the voter's signature by persons who did not see the voter sign the affidavit, and would cause the absentee ballot to be submitted and voted.

Pet. App. 28. At trial, Cora Stewart reviewed the affidavits and identified the affidavits that she and Tyree witnessed without the voter present. *Ibid.*

During the defense, Tyree called Hutton to testify. When Hutton invoked her Fifth Amendment privilege and refused to testify, petitioner sought to introduce

Hutton's testimony from the selective prosecution hearing. The government objected on the ground that it did not have an opportunity at the hearing to complete Hutton's cross-examination. The district court sustained the government's objection, ruling that Hutton's prior testimony was inadmissible under Federal Rule of Evidence 804(b)(1), because the government did not have a "meaningful opportunity to cross examine" at the hearing. Gov't C.A. Br. 48; Pet. App. 30.

The jury returned verdicts of guilty against petitioners on all counts. Petitioners were sentenced pursuant to United States Sentencing Guidelines (Guidelines) § 2H2.1, which provides that the base offense level for obstructing an election is

> (1) **18**, if the obstruction occurred by use of force or threat of force against person(s) or property; or
>
> (2) **12**, if the obstruction occurred by forgery, fraud, theft, bribery, deceit, or other means, except as provided in (3) below; or
>
> (3) **6**, if the defendant (A) solicited, demanded, accepted, or agreed to accept anything of value to vote, refrain from voting, vote for or against a particular candidate, or register to vote, (B) gave false information to establish eligibility to vote, or (C) voted more than once in a federal election.

In the presentence report (PSR), the probation officer concluded that petitioners were subject to a base offense level of 12 pursuant to Guidelines § 2H2.1(a)(2), because their conduct involved forgery and deceit. Tyree Revised PSR para. 20(d); Smith Revised PSR para. 20(d). Petitioners objected to that finding, arguing that their conduct was subject to punishment under subsection (a)(3), because the language in that

subsection tracked the language of the statutes under which they were prosecuted. The district court overruled that objection, and sentenced petitioners to concurrent terms of 33 months' imprisonment. Pet. App. 6.

5. The court of appeals affirmed petitioners' convictions and sentences, except with respect to one of the counts against Tyree (which is not at issue here). Pet. App. 1-38.

a. The court affirmed the dismissal of petitioners' motion to dismiss for selective prosecution.[3] The court rejected petitioners' contention that the district court erred by requiring them to offer clear and convincing evidence of selective prosecution, rather than proof by a preponderance of the evidence. Relying on this Court's guidance in *Armstrong*, 517 U.S. at 465, that "[i]n order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present 'clear evidence to the contrary,'" the court of appeals reasoned that "[c]lear evidence sounds like more than just a preponderance, and evidence that is clear will be convincing." Pet. App. 11. The court further stated that *Armstrong* requires "the defendant to produce 'clear' evidence or 'clear and convincing' evidence which is the same thing." *Ibid.*

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[3] On appeal, the government maintained its position that petitioners had failed to satisfy even the threshold standard established by this Court for obtaining discovery and a hearing on their selective prosecution claim. Gov't C.A. Br. 25. The court of appeals concluded that that argument was not before it and therefore "consider[ed] all of the evidence in the record." Pet. App. 11 n.4. But the court nevertheless stated that its review of the evidence should not "imply[] that we think the district court properly permitted the extensive inquiry it did based upon the showing the defendants had made." *Ibid.*

Upon a "painstaking review of the record" (Pet. App. 16), the court determined that petitioners failed to carry their evidentiary burden with respect to both prongs of their selective prosecution claim—discriminatory effect and discriminatory intent. The court agreed with petitioners that the magistrate judge erred in relying on the possibility of future prosecutions of similarly situated persons in finding insufficient evidence of any discriminatory effect. But the court nevertheless concluded that petitioners failed to meet their burden in showing that the government had not prosecuted similarly situated persons. *Id.* at 16-20.[4]

The court found that the evidence of race-based selection was insufficient, because the white individuals that petitioners claimed were similarly situated did not engage in the same conduct as petitioners. Pet. App. 16. The evidence of selection based on political affiliation was similarly lacking. Petitioners alleged "that other individuals * * * engaged in activities such as paying people to vote, changing a vote on a ballot, and stealing a ballot out of a mailbox." *Id.* at 17. But, as the court explained, such alleged conduct would constitute different crimes than the crimes committed by petitioners. The court reasoned that it was "neither

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[4] The court defined a "'similarly situated' person for selective prosecution purposes" as follows:

> one who engaged in the same type of conduct, which means that the comparator committed the same basic crime in substantially the same manner as the defendant —so that any prosecution of that individual would have the same deterrence value and would be related in the same way to the Government's enforcement priorities and enforcement plan—and against whom the evidence was as strong or stronger than that against the defendant.

Pet. App. 15-16.

authorized nor competent to second guess the government on which among the universe of different crimes should be prosecuted." *Ibid.* Moreover, "some of th[e] alleged misconduct by others involved single instances and not the repeated criminal conduct for which the defendants were prosecuted." *Id.* at 17-18.

Upon its "careful review of the record," the court concluded that the other individuals whom petitioners argued should have been prosecution targets, such as "individuals who witnessed a substantial number of absentee ballots," were not similarly situated with petitioners. Pet. App. 18. As the court explained, petitioners failed to "point to statements (much less testimony) from any of th[e] voters whose absentee ballots were witnessed by [the individuals] indicating that those voters themselves did not actually vote their ballots regardless of who witnessed them." *Ibid.* The court noted that there was "some evidence" that certain other "individuals may have committed the same type of crimes as [petitioners]." *Id.* at 18-19. But that evidence did not meet petitioners' burden, because petitioners committed more offenses than the other individuals, and the government could "legitimately place a higher priority on prosecuting someone who commits an offense three, six or seven times, than someone who commits an offense once or twice, especially when the offense is a non-violent one." *Id.* at 20. Moreover, the record did not establish that "the strength of the evidence that others may have committed similar crimes" was similar to the evidence that resulted in the guilty verdicts against petitioners. *Ibid.*

The court further held that petitioners failed to carry their burden with respect to the discriminatory intent prong of their selective prosecution claim, providing "an independently adequate basis for denial of [that claim]."

Pet. App. 21 n.12. Petitioners cited two events—the "decision to bring the case in federal court, instead of state court," and the disallowed peremptory strike of a black juror. *Id.* at 22. The court found not "a shred of evidence" to support petitioners' suggestion that the decision to bring the case in federal court was prompted by a desire to avoid a black jury. *Ibid.* And the court noted that the government provided a race-neutral reason for exercising the peremptory strike (that the juror was dozing off). Although the district court rejected that strike, the court of appeals concluded that "[r]ejection of one peremptory strike is no basis for concluding that the underlying prosecution is motivated by bias." *Ibid.*

b. The court of appeals held that "the district court did not abuse its discretion" in admitting "a government exhibit consisting of approximately ninety-five affidavits of absentee voter that had been witnessed by Tyree." Pet. App. 27-28. The court agreed with the district court that the affidavits were relevant to the conspiracy charge, which alleged that petitioners and others witnessed voters' signatures on absentee ballots without seeing the voter sign the affidavit. *Id.* at 28. In addition, "[a]t trial, Cora Stewart reviewed the affidavits comprising [the exhibit] and identified which of the affidavits she and Tyree had witnessed where she did not see the voter sign his signature." *Ibid.*

c. The court of appeals affirmed the district court's decision to exclude the prior testimony of Burnette Hutton under Federal Rule of Evidence 804(b)(1). The court explained that, "[a]fter reviewing the relevant part of the record," it agreed that the government had not had a "full opportunity to cross-examine" Hutton at the selective prosecution hearing as a result of Hutton's

assertion of her Fifth Amendment privilege against self-incrimination. Pet. App. 30.

d. The court of appeals rejected petitioners' claim that the district court erred in charging the jury with respect to 42 U.S.C. 1973i(c) and (e), insofar as the instructions allowed the jury to convict without finding that "the voters in whose names ballots were submitted did not consent to the ballots being cast." Pet. App. 30. The court held that consent of the voter is not a necessary element of either offense. *Id.* at 30-31.[5] Because the first two counts of the indictment included allegations that petitioners had acted without the knowledge and consent of the voters in whose names they applied for and cast ballots, however, the court "assume[d]" that petitioners "were entitled to have the jury instructed that lack of knowledge and consent were required" for the first two counts. *Id.* at 31-32. But the court concluded that the instructions on Counts 1 and 2 "sufficiently conveyed to the jury that it had to find a lack of consent by the voter." *Id.* at 33.

e. The court of appeals rejected petitioners' challenges to their sentences, "agree[ing] with the district

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[5] During its discussion of the sufficiency of the evidence on Counts 12 and 13, the court explained that "nothing in § 1973i(c) requires that the [false] information be given without the voter's permission." Pet. App. 23. Those Counts charged Tyree with violating Section 1973i(c) by giving false information on an application for absentee ballot (Count 12) and on an affidavit of absentee voter (Count 13) in the name of Shelton Braggs. The court concluded that there was insufficient evidence with respect to Count 12, because the government did not establish that the information Tyree provided on the ballot application was false. The court came to the contrary conclusion with respect to Count 13, because Tyree "gave false information by signing Braggs' name [on the affidavit], because she is not Braggs." *Id.* at 25.

court that the appropriate base offense level was 12, as provided by § 2H2.1(a)(2)." Pet. App. 34. As the court explained, petitioners' crimes "involved the votes of other individuals" and "[t]he language of (a)(2) applies in a case where forgery, fraud, theft, bribery, deceit, or other means are used to effect the vote of another person." *Ibid.* The court rejected petitioners' reliance on subsection (a)(3), explaining that "the language of (a)(3) addresses an individual who acts unlawfully only with respect to his own vote—an individual who accepts payment to vote, gives false information to establish his own eligibility to vote, or votes more than once in his own name." *Ibid.*

ARGUMENT

The court of appeals conducted a "painstaking review of the record" (Pet. App. 16) and concluded that the district court correctly rejected petitioners' selective prosecution claim, as well as the other challenges made by petitioners to their convictions and sentences. The court of appeals' fact-bound decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. a. Petitioners renew their challenge to the district court's denial of their selective prosecution claim, arguing (Pet. 17-19) that the court of appeals' refusal to apply the preponderance-of-the-evidence standard conflicts with the decisions of this Court and other courts of appeals with respect to equal protection claims. That contention is without merit.

There is no conflict with this Court's decisions. In determining the appropriate standard of proof, the court of appeals specifically followed this Court's teaching in *United States* v. *Armstrong*, 517 U.S. 456 (1996). *Armstrong* considered the threshold showing

that a defendant must make to obtain discovery on a selective prosecution claim. But in resolving that issue, the Court reaffirmed that defendants must meet a "rigorous standard" in proving a selective prosecution claim. *Id.* at 468; *id.* at 463 ("Our cases delineating the necessary elements to prove a claim of selective prosecution have taken great pains to explain that the standard is a demanding one."). "In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present 'clear evidence to the contrary.'" *Id.* at 465 (quoting *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926)). The court of appeals expressly recognized and applied that standard in this case. Pet. App. 11.[6]

In explaining the need for the "clear evidence" standard, the Court in *Armstrong* emphasized its reluctance to interfere with core executive functions such as the decision to enforce the Nation's criminal laws. The Court explained that it applies a "presumption of regularity" to prosecutorial decisions in recognition of the Court's limited constitutional role, its relative lack of institutional competence to second-guess executive decisions, and the damage that interference could inflict on law enforcement. 517 U.S. at 464-465. Without disputing that rationale, petitioners state (Pet. 18) that this Court's equal protection cases require only proof "by a preponderance." But none of the cases cited by

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[6] The court of appeals looked for "clear and convincing" evidence of selective prosecution, reasoning that "[c]lear evidence sounds like more than just a preponderance, and evidence that is clear will be convincing." Pet. App. 11. But the court also specifically stated that, under the standard it applied, "clear evidence" and "clear and convincing" evidence are "the same thing." *Ibid.* Petitioners object to the application of any standard of proof beyond a preponderance of the evidence.

petitioners in support of that proposition involved a claim of selective prosecution.[7] While this Court has applied the preponderance standard in other contexts, the Court has made clear that a selective prosecution claim presents unique concerns that require that courts apply a "rigorous standard"—"clear evidence"—in reviewing such claims. *Armstrong*, 517 U.S. at 468.[8]

The "clear evidence" requirement enunciated in *Armstrong* accords with the approach taken by this Court in *McCleskey* v. *Kemp*, 481 U.S. 279 (1987). *McCleskey* involved an equal protection claim that the defendant's death sentence was imposed on account of his race. The Court held that it "would demand exceptionally clear proof" that prosecutors have exercised their discretion to enforce the law on the basis of race.

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[7] Petitioners point (Pet. 18) to *Personnel Administrator* v. *Feeney*, 442 U.S. 256 (1979) (challenge to state statute affording veterans a preference over nonveterans in hiring decisions for state civil service positions); *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) (challenge to local government's denial of a rezoning request); and *Washington* v. *Davis*, 426 U.S. 229 (1976) (challenge to recruitment practices for District of Columbia police officers).

[8] In *Armstrong*, 517 U.S. at 465, and *Wayte* v. *United States*, 470 U.S. 598, 608 (1985), this Court also referred to the application of "ordinary equal protection standards." But the Court did so for the particular purpose of establishing the *elements* of a selective prosecution claim—namely, discriminatory purpose and discriminatory effect—and not to establish the standard of proof necessary to establish those elements. See *Armstrong*, 517 U.S. at 465 ("The requirements for a selective-prosecution claim draw on ordinary equal protection standards. The claimant must demonstrate that the federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose.") (internal quotation marks and citation omitted); *Wayte*, 470 U.S. at 608-609.

Id. at 297. In so holding, the Court specifically relied upon "the policy considerations behind a prosecutor's traditionally 'wide discretion.'" *Id.* at 296.

Nor does the court of appeals' decision conflict with the decisions of other circuits. See *United States* v. *Magana*, 127 F.3d 1, 8 (1st Cir. 1997) ("[C]ourts have consistently demanded 'clear evidence'" of selective prosecution claim.) (citing cases). The cases cited by petitioners are not to the contrary. In *United States* v. *Redondo-Lemos*, 955 F.2d 1296, 1302 (9th Cir. 1992), the Ninth Circuit employed the preponderance-of-the-evidence standard in reviewing a selective prosecution claim, but that case was decided before *Armstrong*. *United States* v. *Darden*, 70 F.3d 1507, 1531 (8th Cir. 1995), cert. denied, 517 U.S. 1149 (1996), not only was decided before *Armstrong*, but also involved a *Batson* claim. In *Armstrong*, this Court expressly distinguished *Batson* claims from selective prosecution claims in holding that the latter are subject to more exacting proof requirements. 517 U.S. at 467-468. *Eagleston* v. *Guido*, 41 F.3d 865, 878 (2d Cir. 1994), cert. denied, 516 U.S. 808 (1995), involved a gender discrimination claim and, in any event, did not decide the standard of proof that the plaintiff had to meet in support of that claim. The court of appeals in that case upheld a directed verdict for the defendants on the ground that there was *no* evidence of discriminatory intent.

b. Petitioners challenge (Pet. 19-22) the court of appeals' application of the similarly situated requirement, claiming that the court's approach will make a selective prosecution claim "impossib[le]" (Pet. 21) to prove. That contention lacks merit.

Petitioners misconstrue (Pet. 21) the court of appeals' decision as requiring them to prove that the prose-

cution "would have the same deterrence value and would be related in the same way to the Government's enforcement priorities and enforcement plan," *in addition to* showing the existence of other individuals who "committed the same basic crime in substantially the same manner as the defendant." *Ibid.* (quoting Pet. App. 16). In fact, the court of appeals made clear that proof of the latter *illustrates* the former. See Pet. App. 16-17. The court also stated that petitioners could prevail by showing that the government could prove "that someone else had engaged in the same type of conduct [as petitioners], committing the same crime in that or substantially the same manner." *Id.* at 16. It is not impossible for selective prosecution claimants to meet that burden when prosecutors have in fact singled defendants out on an improper basis, because the defendant can obtain the right to discover information pertaining to the prosecution under the standards articulated in *Armstrong*, 517 U.S. at 468-470.

Petitioners contend (Pet. 21) that this case illustrates the "impossibility" of meeting the similarly situated requirement, because there was evidence of other individuals who had "arguably committed precisely the same offense" with respect to two ballots, and petitioners had only committed violations on three and six ballots, respectively. But, as the court of appeals explained, the number of violations an individual has committed is a relevant factor in determining whether to prosecute a case. Pet. App. 20. Moreover, as the court noted, "we do not know from the record the strength of the evidence that others may have committed similar crimes." *Ibid.* In any event, petitioners were not only accused of a greater number of violations, but they were accused of conspiring with each other and with others. In addition, petitioners were public

figures (Smith was a candidate for office and Tyree was the deputy county registrar). See *United States* v. *Hastings*, 126 F.3d 310, 315 (4th Cir. 1997) ("[T]he increased deterrent effect of prosecution of prominent figures is a legitimate consideration in favor of prosecution."), cert. denied, 523 U.S. 1060 (1998).[9]

In any event, even if petitioners were correct that the court of appeals erred in applying the similarly situated requirement of the discriminatory effect prong, the court also concluded that petitioners failed to establish the requisite discriminatory intent, "which is an independently adequate basis" to reject their selective prosecution claim. Pet. App. 21 n.12. Apart from

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[9] Petitioners suggest (Pet. 21-22) that the decision below conflicts with *United States* v. *Parham*, 16 F.3d 844 (8th Cir. 1994), and *Attorney General of the United States* v. *Irish People, Inc.*, 684 F.2d 928 (D.C. Cir. 1982), cert. denied, 459 U.S. 1172 (1983), insofar as the "[d]iscussion[] of the 'similarly situated' requirement" is concerned. This Court does not grant certiorari to resolve differences in the "[d]iscussion[s]" (Pet. 21) contained in lower court decisions. Cf. *California* v. *Rooney*, 483 U.S. 307, 311 (1987) ("This Court reviews judgments, not statements in opinions.") (internal quotation marks omitted). In any event, in *Parham*, the court of appeals found that the defendant failed to present even a prima facie showing that similarly situated individuals were not prosecuted, and underscored that the defendant bears a "heavy" burden in establishing selective prosecution. 16 F.3d at 846; see *id.* at 846-847 ("[E]gregious as they are, the acts summarized in the affidavits are not sufficiently similar to the acts of voter fraud for which [defendants] were prosecuted to constitute a prima facie case of selective prosecution."). The selective prosecution claim in *Irish People* also failed. Moreover, the court of appeals in that case reaffirmed that "[i]f, as the district court found, there was no one to whom defendant could be compared in order to resolve the question of selection, then it follows that defendant has failed to make out one of the elements of its case." 684 F.2d at 946; see *id.* at 948 n.118.

challenging the court of appeals' application of the clear evidence standard, see Pet. 17-19, petitioners offer no answer to the court's conclusion that the defendants offered no proof of discriminatory intent by pointing to "the decision to bring the case in federal court, instead of state court," and to the district court's rejection of the government's race-neutral explanation for one peremptory challenge, because the district court "did not agree with the government's observations." Pet. App. 22. Because petitioners' failure to prove discriminatory intent is fatal to their selective prosecution claim, review of the court of appeals' disposition of the discriminatory effect requirement would not assist them.

2. Petitioners challenge (Pet. 22-24) the court of appeals' holding that lack of voter consent is not an element of the 42 U.S.C. 1973i(c) or (e) offense, and claim that that ruling conflicts with the decisions of other circuits. That contention is without merit and does not warrant further review.

With respect to the Section 1973i(e) Counts (Counts 1 and 2), the court of appeals "assumed" for purposes of this case that the government was required to prove lack of consent (because of the way in which the indictment was drafted as to those counts), and concluded that the jury instructions "sufficiently conveyed to the jury that it had to find a lack of consent by the voter." Pet. App. 33. The court of appeals properly concluded that lack of voter consent was not a necessary element of the offense with respect to the other counts. See *id.* at 23, 30-31. But, in any event, even if the government had been required to prove lack of consent, the evidence in this case overwhelmingly established that the victim voters did not consent to having absentee balloting documents filled out and signed for them, or

absentee ballots cast on their behalf. See pp. 3-6, *supra*; Gov't C.A. Br. 36.

The cases cited (Pet. 23) by petitioners do not establish that lack of consent is an element of the Section 1973i(e) offense. In *United States* v. *Salisbury*, 983 F.2d 1369 (6th Cir. 1993), the court of appeals held that Section 1973i(e) was unconstitutionally vague as applied to the conduct of the defendant, who was alleged to have instructed voters how to vote their absentee ballots. *Id.* at 1372-1380. In *United States* v. *Cole*, 41 F.3d 303 (7th Cir. 1994), cert. denied, 516 U.S. 826 (1995), the court of appeals rejected a vagueness challenge to Section 1973i(e) in a case involving evidence that the defendant, who was himself a candidate for office, punched multiple absentee ballots that voters had signed. The court held that ordinary people could conclude that the defendant's conduct violated the law because the defendant was executing his own preferences on the ballots (regardless of whether the voters consented to that arrangement). *Id.* at 308.

The court of appeals correctly held that Section 1973i(c) (charged in Counts 3 through 13) does not require proof of lack of consent. The argument that a defendant's provision of false information to establish another voter's eligibility to vote would be excused if that voter consented to the provision of such false information finds no support in the text of Section 1973i(c), and has not been embraced by any court. *United States* v. *Boards*, 10 F.3d 587 (8th Cir. 1993), cert. denied, 512 U.S. 1205 (1994), is not to the contrary. In that case, the court of appeals simply referred to evidence that the defendant marked a voter's absentee ballot "without authorization" for the purpose of illustrating the sufficiency of the evidence that the defendant violated Section 1973i(c). *Id.* at 590. The court did

not hold that lack of consent is a necessary element of the offense.[10]

3. Petitioners contend (Pet. 25-27) that the court of appeals misapplied Guidelines § 2H2.1 by holding that subsection(a)(2) applied to their conduct, rather than subsection(a)(3). That contention is without merit and, in any event, does not warrant further review. The court of appeals provided a well-reasoned explanation for its interpretation of the Guidelines on this particular issue. Pet. App. 34. No other court of appeals has interpreted the Guidelines in a contrary fashion, and the Sentencing Commission may amend the Guidelines if it believes that such action is necessary. See *Braxton* v. *United States*, 500 U.S. 344, 348 (1991).

4. Tyree contends (Pet. 27-28) that the district court's decision to exclude the prior testimony of

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[10] Petitioner also cites *United States* v. *Gordon*, 817 F.2d 1538 (1987), vacated in part on reh'g, 836 F.2d 1312 (11th Cir.), cert. denied, 487 U.S. 1265 (1988), and *United States* v. *Hogue*, 812 F.2d 1568 (11th Cir. 1987), but neither of those cases held that lack of consent is an element of the offenses petitioners committed. See *Gordon*, 817 F.2d at 1542; Pet. App. 31 n.20 (distinguishing *Hogue*). In any event, this Court will not grant certiorari to resolve an intra-circuit conflict. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Petitioners' reliance on *Jacobs* v. *Seminole County Canvassing Board*, 773 So. 2d 519 (Fla. 2000), is also misplaced. The Florida Supreme Court held there that the record did not support a finding of fraud by a county supervisor who allowed representatives of one political party to add voter identification numbers to absentee ballot applications because the information provided by the voters themselves "was sufficient to establish the qualifications of the applicant." *Id.* at 523. Here, by contrast, petitioners falsified key information, including the names and addresses of voters. *Jacobs* did not turn on the issue of voter consent, and nothing in the decision below suggests that the conduct at issue in *Jacobs* constituted a violation of Section 1973i(c) or Section 1973i(e).

Burnette Hutton pursuant to Federal Rule of Evidence 804(b)(1) violated Tyree's Fifth and Sixth Amendment rights. That contention lacks merit.

As discussed above, at the selective prosecution hearing, the government advised the magistrate judge that Hutton would be committing perjury if she testified in a manner consistent with an earlier affidavit (which the government had determined contained certain false statements). The magistrate judge advised Hutton of her Fifth Amendment privilege against self-incrimination and offered to appoint counsel for her, but Hutton chose to continue her testimony. It was only after the government requested handwriting samples from Hutton in response to her testimony that she had signed a ballot affidavit that Hutton decided to consult with an attorney and then to invoke her Fifth Amendment privilege. In response, the government sought to continue its cross-examination on the ground that Hutton had waived the privilege, but the district court rejected the waiver argument and excused Hutton. See p. 7, *supra*; Pet. App. 29.

The government's request for handwriting samples was entirely proper under the circumstances, given that the government was seeking to impeach Hutton's credibility and had information indicating that she had made other false statements regarding voting assistance. Gov't C.A. Br. 46. Moreover, the government's request in no way "compelled" Hutton to invoke her Fifth Amendment privilege, because that privilege does not protect against the provision of physical evidence such as handwriting samples. See *Gilbert* v. *California*, 388 U.S. 263, 266-267 (1967); *United States* v. *Euge*, 444 U.S. 707, 718 (1980); see also, *e.g.*, *Northern Mariana Islands* v. *Bowie*, 236 F.3d 1083, 1094 n.5 (9th Cir. 2001) ("Requests by the prosecution for handwriting and

fingerprint evidence * * * are not prohibited by the Fifth Amendment right against self-incrimination because such evidence is not testimonial in nature.").[11] The court of appeals' fact-bound conclusion that the district court did not err in excluding the Hutton testimony pursuant to Rule 804(b)(1) does not merit further review in this Court.

5. Petitioners argue (Pet. 28-30) that the court of appeals erred in holding that the district court did not abuse its discretion in admitting a government exhibit consisting of absentee voter affidavits that Tyree witnessed. That contention lacks merit. As the court of appeals explained, the affidavits were relevant to the conspiracy charge, which alleged, *inter alia*, that petitioners and their co-conspirators completed affidavits and witnessed voters' signatures without voters being present. Pet. App. 28. In addition, "[a]t trial,

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[11] Moreover, the handwriting request in this case stands in stark contrast to the type of conduct that has been held to improperly interfere with a defendant's ability to present witnesses on her behalf. Compare, *e.g.*, *Webb* v. *Texas*, 409 U.S. 95, 95-98 (1972) (trial judge "effectively drove [the] witness off the stand" when he addressed witness and implied that witness would lie, stated that he would "personally see" that witness be indicted for perjury, and told witness that witness would likely be convicted and face serious additional punishment); *Magouirk* v. *Warden*, 237 F.3d 549, 554-555 (5th Cir. 2001) (defendant waives right to confront witness where defendant procures witness's unavailability by threatening witness and physically attacking him). Here, the government did not "threaten[] to indict [Hutton] for perjury," Pet. 27, but instead simply advised the magistrate judge of its belief that she would perjure herself if she testified consistent with her affidavit, and asked the magistrate judge to warn her of her Fifth Amendment rights. That is not improper or intimidating. See *United States* v. *Davis*, 974 F.2d 182, 188 (D.C. Cir. 1992), cert. denied, 507 U.S. 979 (1993).

Cora Stewart reviewed the affidavits comprising [the exhibit] and identified which of the affidavits she and Tyree had witnessed where she did not see the voter sign his signature." *Ibid.* The cases cited by petitioners are inapposite because they all involved prior acts that were extrinsic to the crime charged. See *United States* v. *Anderson*, 933 F.2d 1261, 1267-1274 (5th Cir. 1991); *United States* v. *Sullivan*, 919 F.2d 1403, 1416 (10th Cir. 1990); *United States* v. *Guerrero*, 650 F.2d 728, 732-736 (5th Cir. 1981); see also *United States* v. *Veltmann*, 6 F.3d 1483, 1497-1499 (11th Cir. 1993); *United States* v. *Dothard*, 666 F.2d 498, 501-505 (11th Cir. 1982).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 00-1192

IN THE

Supreme Court of the United States

FRANK SMITH AND CONNIE TYREE, *Petitioners,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

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REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

The Government's Brief in Opposition is riddled with misstatements of the law, distortions of the record, and internal inconsistencies so numerous that they cannot all be addressed within the limitations prescribed by S. Ct. R. 33. We deal in this Reply only with the most significant errors.

I. The Selective Prosecution Claim

Petitioners claim that they were singled out for prosecution on the basis of their race and political affiliation. Applying the standard announced by this Court in *United States v. Armstrong*, 517 U.S. 456 (1996), a Magistrate Judge concluded they were entitled both to discovery and to an evidentiary hearing. At the end of that hearing, he found that it was "*certainly* true that there [was] evidence in the record indicating that other people [had] engaged in fraudulent absentee-ballot voting activities, including forging voters' signatures and altering ballots." App. 57 (emphasis added). But both the Magistrate Judge and the Court of Appeals then advanced novel and unsupportable formulations of the legal standards to be applied to claims of selective prosecution[1] that conflict both with the decisions of other courts of appeals (as the Government's Brief in Opposition concedes) and with rulings of this Court (which the Government denies).

A. *The Burden of Proof Question*

This Court has explicitly ruled that "ordinary equal protection standards" govern selective-prosecution claims. *Wayte v. United States*, 470 U.S. 598, 608 (1985); *Armstrong*, 517 U.S. at 465. Among those standards is the burden of

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[1]Petitioners also seek review of the Court of Appeals' similarly unprecedented reading of the Sentencing Guidelines provisions applicable to these prosecutions. See Pet. at 25-27.

proof. There are two aspects to the burden of proof: its location and its weight. The location indicates which party loses if the burden is not met. The weight describes how persuasive the evidence must be in order to satisfy the burden. Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 Yale L.J. 1299, 1301 (1977). Petitioners and the Government agree on the location of the burden of proof in a selective-prosecution case: it rests on the defendant who alleges selective prosecution. Where we differ is on the weight of the burden a defendant must bear.

There are three distinct burdens of proof that might apply to a legal claim: proof by a preponderance of the evidence; proof by clear and convincing evidence; and proof beyond a reasonable doubt. *See Addington v. Texas*, 441 U.S. 418, 423 (1979). This Court has made it crystal clear that "'[p]reponderance of the evidence' and 'clear and convincing evidence' describe well known, contrasting standards of proof." *Allentown Mack Sales & Service v. N.L.R.B.*, 522 U.S. 359, 376 (1998).

The Government is unable to point to a single case in any area of equal protection law in which any court has required any claimant to prove a violation by clear and convincing evidence. Indeed, even in *McCleskey v. Kemp*, 481 U.S. 279 (1987), the case on which the Government relies, Br. Opp. 17, the Supreme Court did not "hold" (as the Government suggests, *id.* at 17-18) in affirming the lower court's judgment, that a burden of proof higher than the preponderance standard applied to McCleskey's equal protection claim. The statement quoted by the Government is *dictum*, at best, and the phrase "clear and convincing" appears nowhere in either the Supreme Court's opinion nor in that of the district court whose judgment it approves.

The Government acknowledges, as it must, that the Ninth Circuit, in clear conflict with the decision in this case, has announced that the proper burden of proof in a selective-prosecution case is proof by a preponderance. *United States v. Redondo-Lemos*, 955 F.2d 1296 (9th Cir. 1992), *appeal after remand sub nom. United States v. Alcaraz-Peralta*, 27 F.3d 439 (9th Cir. 1994). All the Government can say is that *Redondo-Lemos*, and the other cases the Petitioners cite, in which courts of appeals have applied the preponderance of the evidence standard to judge claims of equal protection violations by prosecutors or other law enforcement officials, were decided before *Armstrong*. Br. Opp. 18. But *Armstrong* announced no change in the pre-existing law. On the relevant question, it quotes *Wayte*, which was decided nearly a decade *before* the cases with which the holding below is in conflict.

The reason no court has ever adopted the Government's position becomes obvious if one considers the purpose of burdens of proof. As the Court explained in *Addington*,

> adopting a "standard of proof is more than an empty semantic exercise." In cases involving individual rights, whether criminal or civil, "[the] standard of proof [at a minimum] reflects the value society places on individual liberty."

418 U.S. at 425 (quoting *Tippett v. Maryland*, 436 F.2d 1153, 1166 (4th Cir. 1971) (Sobeloff, J., concurring in part and dissenting in part), *cert. dismissed sub nom. Murel v. Baltimore City Criminal Court*, 407 U.S. 355 (1972)) (interpolations in the original).

In what sorts of selective-prosecution cases would the standard of proof make a difference? Only in cases where the burden-bearing party has satisfied one standard but fails a higher one. Put plainly, the Government wants this Court to leave intact a ruling that federal courts should allow prosecutions to proceed even if they have found, as a fact, that

it is more likely than not that the government chose to prosecute a defendant because of the defendant's race, political affiliation, or exercise of constitutional rights. To state the proposition accurately is to show its utter constitutional repugnance.

B. *The "Similarly Situated" Requirement*

The Brief in Opposition never really engages Petitioners' arguments regarding the Court of Appeals' misapplication of the "similarly situated" requirement. Our central point was quite simple: the Court of Appeals adopted an unconscionably stringent definition of the word "similarly." That definition allowed the Court of Appeals to ignore completely the unchallenged evidence in the record regarding other individuals who engaged in the same activities as petitioners and to hold—to take only one egregious example—that Petitioner Smith, who was convicted with regard to irregularities concerning *three* voters' ballots, was not similarly situated to individuals who engaged in the same kind of behavior with respect to *two* voters' ballots.

The Government's attempt to rehabilitate this absurd standard falls flat. It begins by claiming that "we do not know from the record the strength of the evidence that others may have committed similar crimes." Br. Opp. 19 (quoting Pet. App. 20). But before the Court of Appeals' decision in this case, no court had ever held that defendants must show not only that there are similarly situated individuals, but also "that the evidence [against those individuals] was as strong or stronger than that against the defendant." Pet. App. 16.

Given that the Government's own contention at the selective prosecution hearing was that *its* investigations were "on-going" and that Petitioners were "but the first in a series of people yet to be indicted and prosecuted," Pet. App. 57, it would be deeply unfair—if not impossible—to require that defendants be able to put on a full-dress criminal prosecution

with regard to similarly situated individuals at the pre-trial selective prosecution hearing.

Moreover, the requirement is incapable of satisfaction. How a defendant is to make a comparative showing, pretrial, before he knows or can assess the strength of the government's case *against him*, is entirely unclear. And even if a defendant is given sufficient discovery to identify similarly situated individuals, it strains credulity to expect that such discovery would include access to prosecutorial assessments of the relative strength of potential cases against the defendants and others.

Finally, defendants of course lack any power to immunize witnesses; thus, they cannot, for example, compel testimony from allegedly similarly situated individuals to prove that those individuals engaged in similar conduct.

Even more disturbing is the Government's offhanded attempt to explain why Petitioners were so uniquely situated that their prosecution was especially justified: "petitioners were public figures (Smith was a candidate for office and Tyree was the deputy county registrar)." Br. Opp. 19-20. Absolutely *nothing* in the record suggests that the prosecutors who brought this case relied on Smith's candidacy, or Tyree's being a deputy registrar, as the reason for bringing this prosecution. This is pure and utter after-the-fact speculation dreamed up by government attorneys sitting in Washington, D.C. about what motivated government lawyers in Alabama.

Even worse, the assertion seriously misrepresents the record. Petitioner Tyree was *not* "*the* deputy county registrar," a characterization that makes it sound as if Tyree were a high-level official in the registrar's office. Not at all. The Government's own witness, Joyce Langham, an employee of the Greene County Board of Registrars, when asked about the existence of deputy registrars not only named eleven individuals (including Rosie Carpenter, one of the people

whom Petitioners alleged was a similarly situated individual), but then made clear that there were a number of others whose names she could not even recall. She also testified that the position was essentially a volunteer job that simply involved helping individuals in the community to register. Tr. 298-99.

C. *Relationship of the Improper "Similarly Situated" Standard to the Discriminatory Purpose Prong*

The Government argues that even if the courts below completely misconstrued the "similarly situated" requirement, this Court should deny certiorari because the Court of Appeals' holding that Petitioners failed to prove a discriminatory purpose provides an alternative basis for rejection of our claim. Br. Opp. 20-21. This argument rests on two fundamental misunderstandings. First, the Petition raises the question whether the Court of Appeals applied the wrong legal standard to Petitioners' argument regarding discriminatory purpose. See Pet. i (Question Presented 1.a.). If Petitioners prevail on that issue, we will be entitled to reconsideration by the Court of Appeals of the evidence we presented regarding the discriminatory motivations behind the prosecution.

Second, the mistakes of the courts below in assessing the evidence of discriminatory impact also infected their assessment of the allegation of discriminatory purpose. Had the Court of Appeals properly recognized the presence of similarly situated individuals—individuals whom the record showed were white or black members of the white-dominated CBGC political faction opposing Petitioners' organization—it would then have been compelled to ask the question why the Government did not prosecute any of these other people. This evidence of non-prosecution would have cast the other evidence of discriminatory purpose that Petitioners presented

in a substantially different light.[2]

II. The Court of Appeals' Elision of the Requirement of Demonstrating Lack of Voter Consent to Prove a Violation of 42 U.S.C. §§ 1973i(c) and 1973i(e)

At trial, on appeal—and at least until the end of the Brief in Opposition's statement of facts—the gravamen of the Government's case was that Petitioners were involved in a scheme to apply for and cast absentee ballots in the names of seven voters *without those voters' consent.* Indeed, the Government was so keen on proving this lack of consent that it impeached two of the six so-called "victim voters" by relying on their grand jury testimony when they testified at trial that they had expressly consented to Petitioners' acts. See Pet. at 7. And it went so far as to threaten a defense witness with prosecution for perjury because she had testified at the selective-prosecution hearing that she had signed the ballot affidavit of her illiterate father (a voter whose ballot application Tyree had signed) with his express consent. See

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[2]Here, too, the Government seriously misrepresents the record. It euphemistically refers to the prosecutor's *Batson* violation—which sheds light on the motivation behind the prosecution since one of Petitioners' arguments was that the federal prosecution in this case was explicable as reflecting in part the state government's desire to try Petitioners in front of a largely white jury pool—as "the district court's rejection of the government's race-neutral explanation for one peremptory challenge because the district court 'did not agree with the government's observation.'" Br. Opp. (quoting Pet. App. 22.). In fact, in overturning the prosecutor's use of a peremptory challenge, the district judge—who after all was physically present to weigh the credibility of the prosecutor's explanation—necessarily concluded that the Government's explanation was a "pretext for purposeful discrimination," *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

Pet. at 8-9, 27-28. But the Court of Appeals held that lack of consent was not a required element of a violation of 42 U.S.C. § 1973i, a position the Government now adopts despite its inconsistency with both its own trial strategy and with the approach taken by every other court of appeals to have addressed the issue.

The Court of Appeals' decision in this case marks the first time any court has ever affirmed a defendant's conviction under 42 U.S.C. §§ 1973i(c) or 1973i(e) without explicitly finding that the defendant acted without the nominal voter's consent. The Brief in Opposition seeks to obfuscate this point by raising a complete straw man—suggesting that Petitioners are somehow arguing that a "defendant's provision of false information to establish another voter's eligibility to vote would be excused if that voter consented to the provision of such false information." Br. Opp. 22.

Petitioners suggested nothing of the sort. The Government's argument reflects the casuistical definition of "false information" most clearly propounded by the Court of Appeals in discussing Count 13 of the indictment, which charged petitioner Tyree with respect to Shelton Braggs' ballot affidavit. The Government did not call Braggs as a witness. Thus, there was literally *no* evidence of nonconsent in the record.[3] Nonetheless, because under Alabama law, "[a] voter cannot legally authorize or direct another to vote his ballot in his place[, Tyree] . . . gave false information by signing Braggs' name, because she is not Braggs." Pet. App. 25. Under the interpretation of the Government and the Court of Appeals, Tyree would have committed a *federal* felony even if

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[3]In fact, after the trial but before the sentencing in this case, Braggs provided a sworn statement that "he gave Tyree permission to cast an absentee ballot for him provided that she voted the ballot for Smith." See App. 22 n.13.

Braggs had been sitting in the room with her and asked her to sign his ballot affidavit because his hands were dirty. That simply cannot be the law.

As we pointed out in the petition, Pet. at 7-10, the question of the seven voters' consent was hotly contested at trial. If the Government's current reading of § 1973i is correct, then the Government's conduct at trial is simply inexplicable. There was no point to the Government's fierce attempts to prove nonconsent: even if each of the voters had gotten on the stand and testified that he or she explicitly directed Petitioners to assist in the application or voting process, Petitioners should still have been convicted.

Perhaps recognizing the bankruptcy of its statutory construction, the Government retreats to the contention that "in any event, even if the government had been required to prove lack of consent, the evidence in this case overwhelmingly established that the victim voters did not consent . . . ." Br. Opp. 21. Once again, the Government has misrepresented the record. There was literally *no* evidence on lack of consent with respect to one voter, Shelton Braggs, whom the Government did not even call as a witness. Two of the other six "victim" voters testified at the trial that they *had* consented. See Tr. 472 (voter Michael Hunter); Tr. 567 (voter Willie C. Carter). A third and a fourth voter were vigorously cross-examined about prior statements given to the FBI or defense counsel that suggested they had consented. Tr. 370, 390, 396, 403 (voter Angela Hill, who was Petitioner Tyree's estranged half-sister); Tr. 540 (voter Cassandra Carter). With respect to yet a fifth voter—Sam Powell—petitioner Tyree was prevented from presenting a witness, Powell's daughter Burnette Hutton, who would have testified that she had signed his voter affidavit with his consent. See Pet. 8-10. And with respect to the sixth voter, Eddie Gilmore, uncontested expert testimony established that he had written his own signature on

his ballot application, Tr. 1025, for which Petitioner Tyree was nonetheless convicted.

Of course, the question before this Court is not whether the voters in fact consented. Petitioners acknowledge that despite the bewildering array of testimony, recantation, and contradictory statements given by the six voters whom the prosecution chose to call, there was sufficient evidence from which a properly instructed jury *could* have concluded that six of the voters did not consent. But for the reasons we explained in our petition for certiorari, this jury was not properly instructed. Pet. 10-11, 14-15, 24-25. Thus, the jury might well have convicted Petitioners on the assumption that even if the voters had consented, Petitioners were nonetheless guilty. The fact that the jury could convict Petitioner Tyree with respect to two counts related to Shelton Braggs (who never appeared in court at all) and one count related to the ballot application of Eddie Gilmore after uncontradicted expert testimony showed that he himself had probably written his own signature on the form simply because she wrote his name, residence, mailing address and county name on the form undermines any suggestion that the jury necessarily concluded that Petitioners acted without the voters' consent.

The Court of Appeals' misconstruction of the substantive criminal statutes that Petitioners were charged with violating thus cannot be neatly excised from this case, as the Government suggests, by hypothesizing that *if* the jury had been properly instructed that lack of voter consent was an essential element of the offenses, it *would have* returned guilty verdicts that *would* find support in the record. Such an argument makes the jury trial itself superfluous, in clear violation of the Sixth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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